SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 817

P. J. CARLIN CONSTRUCTION CO. AND THE TRAVELERS INSURANCE COMPANY, PETITIONERS,

vs.

EDWARD HEANEY AND STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of November in the year of our Lord one thousand nine hundred and thirty-five, before the Judges of said Court.

Witness—The Hon. Frederick E. Crane, Chief Judge Presiding. Wm. J. Armstrong, Clerk.

In the Matter of

The Claim for Compensation, &c., made by EDWARD HRANEY

vs.

P. J. CARLIN CONSTRUCTION Co., Employer, & ano., &c.

REMITTITUR—November 20, 1935

Be it remembered, That on the 17th day of May, in the year of our Lord one thousand nine hundred and thirty-[fol. 2] five, P. J. Carlin Construction Co., employer, and another, &c., the appellants in this cause, came here unto the Court of Appeals, by E. C. Sherwood, their attorney, and filed in the said Court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department. And State Industrial Board the respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney-General.

Which said notice of appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. William B. Davis, of counsel for the appellants, and by Mr. Roy Wiedersum of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. A question under the Federal Constitution was presented and necessarily passed

upon by this Court. It relates to the exclusive jurisdiction of the Federal Courts over Admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the Workmen's Compensation Law of the State applied, and that the Federal Courts had not exclusive jurisdiction to afford relief.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

[fol. 3] Wherefore, it is considered that the said order be affirmed with costs, &c., &c., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

John Ludden, Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, November 20, 1935.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Deputy Clerk. (Seal.)

[fol. 4] IN COURT OF APPEALS OF NEW YORK

In the Matter of

The claim of EDWARD HEANEY for Compensation under the Workmen's Compensation Law; STATE INDUSTRIAL BOARD, Respondents,

against

P. J. CARLIN CONSTRUCTION CO., Employer; THE TRAVELERS INSURANCE COMPANY, Insurance carrier, Appellants

STATEMENT UNDER RULE 234

The injury to the employee occurred on September 9, 1932.

At a session of the State Industrial Board held on December 8, 1933, the award from which this appeal is taken was made, granting compensation to Edward Heaney.

The employer and the insurance carrier appear herein by E. C. Sherwood and the State Industrial Board by the Hon. John J. Bennett, Jr., the claimant by Slavin & Lichtman.

There has been no change of parties nor attorneys since the commencement of the proceeding, except that the employer and insurance carrier appeared in person or by attorneys other than E. C. Sherwood prior to the service of the notice of appeal.

[fol. 5] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

No. 3,241,796

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that P. J. Carlin Construction Company and The Travelers Insurance Company hereby appeal to the Appellate Division of the Supreme Court, Third Department, from the award of the State Industrial Board

[fol. 6] herein, made and entered in the office of said Board on the 8th day of December, 1933, notice of which award was sent to the parties by mail on the 18th day of December, 1933.

Dated, New York, N. Y., December 26, 1933.

Yours, etc., E. C. Sherwood, Attorney for Appellants, Office & P. O. Address, 100 East 42nd Street, Borough of Manhattan, New York City.

To State Industrial Board, 150 Leonard Street, New York, N. Y. Slavin & Leichtman, Esqs., Attorneys for Claimant, 11 West 42nd Street, New York, N. Y.

[fol. 7] BEFORE STATE INDUSTRIAL BOARD

Case No. 3,241,796

In the Matter of

The claim for compensation under the Workmen's Compensation Law, made by EDWARD HEANEY, Claimant-Respondent,

against

P. J. CARLIN CONSTRUCTION Co., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance carrier, Appellants

Conclusions of Fact, Ruling of Law, Award and Decision

This claim came on for hearing before the State Industrial Board in the State of New York on December 16, 1932, January 27, 1933, April 27, 1933, May 5, 1933 and November 8, 1933.

Appearances:

E. C. Sherwood, Esq., 100 East 42nd Street, New York, N. Y., attorney for appellants.

Slavin & Leichtman, Esqs., 11 West 42nd Street, New York, N. Y., attorney for claimant.

Claimant in person, 3018 Kingsbridge Avenue, New York City.

[fol. 8] All the evidence having been heard and duly considered, the State Industrial Board makes its Conclusions of Fact, Ruling of Law, Award and Decision, as follows:

Conclusions of Fact

1. On September 9, 1932, the day on which Edward Heaney sustained the accidental injuries herein referred to, he resided at 3018 Kingsbridge Avenue, Borough of Manhattan, City and State of New York, and was employed as a bricklayer by the P. J. Carlin Construction Co., with office and principal place of business located at 405 Madison Avenue, Borough of Manhattan, City and State of New York; said employer being engaged as general contractors performing construction work on Rikers Island, State of New York.

2. On September 9, 1932, while the said Edward Heaney was engaged in the regular course of his employment and while working for his employer, and after stepping aboard the steamboat "Observation" on 136th Street, in the Borough of Manhattan, City and State of New York, and standing on the lower deck of the said boat and while the said steamboat was in operation and en route to Rikers Island, the said boat exploded and as a result, the said Edward Heaney was thrown into the river and was caused to sustain accidental injuries in the nature of a fracture of the right lower ribs; laceration of the lung, with resultant pneumothorax, possible internal injuries and moderate shock, which injuries together with the results naturally and unavoidably following therefrom caused Edward Heaney to [fol. 9] be totally disabled from September 9, 1932 to October 14, 1932, on which latter date he was still disabled.

3. The injuries sustained by the said Edward Heaney were accidental injuries and the said Edward Heaney stepped into his employment the moment he stepped aboard the said steamboat "Observation." Therefore, the injuries which he sustained as aforesaid arose out of and in the course of his employment.

4. The average weekly wage of Edward Heaney was the sum of $66.00.

5. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the City of New York was the owner of Rikers Island and had entered into a contract with the above named employer, P. J. Carlin Construction Co., which among other provisions, Section 14 thereof provided that the employer-con-

tractor herein must assume responsibility for transportation from the mainland to Rikers Island of men and material for all work done under said contract and that the City of New York shall not be held responsible for providing regular ferry service.

6. Prior to the time the said Edward Heaney sustained the accidential injuries herein above referred to, the only means of travel or transportation from the New York side to Rikers Island were the steamship "Observation" and the municipal ferry.

7. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the P. J. [fol. 10] Carlin Construction Co., the employer herein, was under a contract with the owner of the steamboat "Observation," under which contract, the said employer guaranteed that the owner of the said steamboat "Observation" would receive $60.00 per day from the employer for transporting the employees of the said employer from the New York side to Rikers Island and from Rikers Island to the New York side, and that any deficit from the fares collected therefrom would be made by the said employer and any surplus remaining therefrom would be placed to the credit of the said P. J. Carlin Construction Co., the employer herein.

8. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the said P. J. Carlin Construction Co., the employer herein, selected the steamboat "Observation" as the exclusive means of conveying the employees, including the claimant herein, from the New York side to Rikers Island and from Rikers Island to the New York side.

9. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the said P. J. Carlin Construction Co., the employer herein, gave instructions to Edward Heaney, the claimant herein, to use the steamboat "Observation" as exclusive means of travel from the New York side to Rikers Island in connection with the work the claimant was to perform on Rikers Island for and in behalf of the P. J. Carlin Construction Co., the employer herein, and forced the said claimant to travel on the said steamboat "Observation," for which ferriage the claimant paid the fare of 10¢ a round trip, or 10¢ a day,

[fol. 11] and further gave the said Edward Heaney instructions forbidding him to travel from the New York side to Rikers Island by means of the municipal ferry. Therefore, the said Edward Heaney had no choice except in an emergency when the municipal ferry, which charged no fare, could be used.

10. Such transportation by means of the steamship "Observation" was included within and was part of the contract of employment between P. J. Carlin Construction Co., the employer herein, and Edward Heaney, the claimant, and was an incident of the claimant's employment.

11. At the time Edward Heaney sustained the accidental injuries herein above referred to, the status of the claimant and the employer herein was a matter of local concern, was subject to the regulation of the State and in no way worked prejudice to any characteristic feature of the General Maritime Law.

12. The claim of Edward Heaney aforesaid is within the jurisdiction of the Industrial Board and not such a matter as is subject to the exclusive jurisdiction of the Admiralty Law.

RULING OF LAW

This claim comes within the provisions of the Workmen's Compensation Law.

AWARD

Award of compensation is hereby made against P. J. Carlin Construction Co., employer, and The Travelers Insur-
[fol. 12] Company, insurance carrier, to Edward Heaney, injured employee, 4 weeks' compensation, covering the period from September 16, 1932, to October 14, 1932, at the rate of $25.00 per week, a total of $100.00 and this case is continued.

The employer and insurance carrier are to be credited with any and all payments heretofore made affecting this award.

DECISION

The previous decision of the Referee dated June 8, 1933, is hereby rescinded in the interests of justice.

Dated, New York, July 7, 1934.

State Industrial Board, Edw. Edwards, L. W. Hatch, Nellie Swartz.

BEFORE STATE INDUSTRIAL BOARD

NOTICE OF DECISION

Slavin & Leichtman, 11 West 42nd St., City. Mrs. Edward Heaney, Claimant, 3018 Kingsbridge Ave., City. Travelers Ins. Co., 100 E. 42nd St., City. P. J. Carlin Constr. Co., Employer, 405 Madison Ave., City:

You are hereby notified that at a hearing held before the Industrial Board on Dec. Cal. 6-8-33 a decision was made in the above case of Edward Heaney, decedent, as follows: [fol. 13] Claim disallowed upon the ground of no jurisdiction and no accident arising out of and in the course of employment.

The above copy of the decision and award is sent you pursuant to law.

Dated 6-8-33 SI closed.

Elmer F. Andrews, Industrial Commissioner.

BEFORE STATE INDUSTRIAL BOARD

NOTICE OF DECISION

December 18, 1933.

Edward Heaney, 3018 Kingsbridge Ave., N. Y. C. P. J. Carlin Constr. Co., 405 Madison Ave., N. Y. C. Travelers Ins. Co., 100 E. 42nd St., N. Y. C. Slavin & Leichtman, Esqs., 11 W. 42nd St., N. Y. C.:

The above case was presented to the Industrial Board on Nov. 8, 1933, for consideration at which time decision was reserved.

After careful review of the papers on file, the action of the Board under date of Dec. 8, 1933, was to find that at the time of the accident the claimant herein was in the course of his employment and that the Board has jurisdiction.

The previous decision of the Referee dated June 8, 1933, disallowing the claim is hereby rescinded and an award is [fol. 14] hereby made to claimant for 4 weeks' compensation covering the period from 9/16/32 to 10/14/32 at $25.00

per week a total of $100.00 and the case is continued to a Referee's calendar for further consideration.

Yours very truly, Elmer F. Andrews, Industrial Commissioner.

December 18, 1933.
Dict. by George M. Custer.
GMC:IL

BEFORE STATE INDUSTRIAL BOARD

MEMORANDUM OF DECISION

June 1, 1933.

Claim disallowed upon the ground of no jurisdiction and no accident arising out of and in the course of employment.

B. W. Nye, Referee.

BEFORE STATE INDUSTRIAL BOARD

Re Case No. 3,241,796

EDWARD HEANEY

vs.

P. J. CARLIN CONSTRUCTION COMPANY

MEMORANDUM OF DECISION

The referee disallowed the claim herein on the ground that the Industrial Board of the State of New York is with-[fol. 15] out jurisdiction, and that the accident did not arise out of and in the course of employment.

The claimant was employed by the general contractor who was doing construction work on Rikers Island. The claimant is a bricklayer. In order to get to Rikers Island the claimant was forced to travel on the steamboat Observation from the New York side to the island. For this ferriage the claimant paid ten cents a round trip, or ten cents a day. He had no choice, except in emergencies when the city ferry could be used, which charged no fare. There is evidence that the general contractor had a conversation

with a city authority, resulting in an understanding that the city ferry was not to be used. In the contract between the general contractor and the owner of the "Observation", it is guaranteed that the owner will receive $60 per day from the general contractor for transporting the general contractor's employees. Any deficit from the fares collected will be made up by the general contractor, and any surplus will be placed to the credit of the general contractor. The fares of the "Observation" were collected by an employee of the general contractor. This employee received $3 per week from the "Observation" and was on their payroll. This was in addition to his regular wages paid by the general contractor.

The Board is of the opinion that, with the above statement of facts, the claimant stepped into his employment the moment he stepped aboard the Steamboat 'Observation" and was, therefore, in the course of his employment when the explosion occurred on the eight o'clock trip from the New York side to Rikers Island, and the Board so finds. [fol. 16] As to the question of jurisdiction, there is no doubt in the mind of the Board but that the "Observation" itself and the men employed thereon were under the jurisdiction of the United States Government, but the claimant, who was a passenger, was of a different class. The status of the claimant and the employer was a matter of local concern.

The Board would differentiate the case at bar with that of Bell vs. West Island Corp., 221 App. Div. 744. In the Bell case, which claim was disallowed by the Court, the claimant, a real estate manager, was on a ferry operated by his employer and was en route to a real estate development on West Island. His contract of employment provided that he should supervise the f- ry boat. The Court ruled the case to be subject to admir..ty control and regulation, upon the ground that the decedent met his death while operating a boat in navigable waters.

In the case at bar the claimant was a passenger on a boat contracted for by his employer to transport his employees under a fixed schedule, and the boat limited its activities to such transportation during the day.

The Board also wishes to point out the difference between the case at bar and the decision of the United States Supreme Court (285 U. S. 502, April 11, 1932) Spencer Kel-

logg vs. Hicks & Company. The Court in the Hicks case emphasizes the interstate carriage by the "Linseed King" (between New York and New Jersey). In the case at bar the interstate question does not enter; it is purely a matter within the State of New York, and the general contractor is not entitled to limitation of liability under the Federal [fol. 17] Statutes. The referee's decision is reversed and the Board finds jurisdiction.

The case is continued to the referee's calendar for further consideration. Award is made for disability from September 9, 1932 to October 14, 1932 at $25 per week.

Nellie Swartz, Member, Industrial Board.

NS/MLH.
December 8, 1933.

BEFORE STATE INDUSTRIAL BOARD

EMPLOYEE'S CLAIM FOR COMPENSATION

1. Name of—Edward Heaney.
2. Address: 3018 Kingsbridge Ave., New York.
3. Sex—Male. Age—25. Married or single—Single.
4. Do you speak English? Yes. Nationality—U. S. citizen by birth.
5. State regular occupation—Bricklayer.
6. What were you doing when injured? Aboard workmen's carrier ("Observation").
7. Wages or average earnings per day, including overtime, board, rent and other allowances—$13.20.
8. Were you paid full wages for the day of accident? No.
9. Piece or time worker—Time.

[fol. 18] 1. Employer—P. J. Carlin.
2. Office address: Brooklyn.
3. Nature of business—General contractor.

1. Location of place where accident occurred—East River and 135 Street.
2. Name of Foreman—"Gene" Faust.
3. Date of accident—the 9 day of September, 1932, at 8 o'clock A. M.

1. How did the accident happen? Explosion aboard workmen's carrier ("Observation").

1. State fully nature of injury—General contusions, abrasions, internal injuries, shock, fractured ribs, injuries

to thorax, injuries to limbs (still under observation).

2. On what date did you stop work because of injury? September 9, 1932.

3. Have you returned to work? No.

4. Does injury keep you from work? Yes.

5. Have you done any work during period of disability? No.

6. Have you received any wages since your accident? No. If so, from and to what date? ——.

7. Has injury resulted in amputation? No.

8. Did you request your employer to provide medical attendance? Yes. Has he done so? ——.

[fol. 19] 9. Attending physician—Lincoln Hosp., 141 St. Southern Blvd.

10. Hospital (Name)—Lincoln Hosp., 141 St. Southern Blvd.; Burke Foundation, White Plains.

1. Have you given your employer notice of injury? Yes. When? Formally October 9 and Sept. 9, 1932.

2. If such notice was given, to whom? P. J. Carlin (Oct.) to foreman; Sept. 9 through the press date of accident also.

3. Was it given orally or in writing? Writing by mail (orally to foreman).

Dated October 9, 1932.

Signed by Edward Heaney, Mail address: 3018 Kingsbridge Ave.

BEFORE STATE INDUSTRIAL BOARD

Minutes of Hearings

Hearing before The Industrial Board, December 16, 1932.
Present—Bertrand W. Nye, Referee.

Appearances:

Slavin & Leichtman, attorneys for claimant, Max Leichtman of counsel.

E. A. Willoughby, attorney for employer and insurance carrier.

The Referee: Are you instituting civil action?

Mr. Leichtman: No, sir, we are resting on the compensation.

[fol. 20] The Referee: You intend to pursue under compensation?

Mr. Leichtman: Right.

OBJECTIONS TO ACTION

Mr. Willoughby: For the purpose of record, Mr. Referee, we desire to file our objections, first, on the ground that the accident did not arise out of and in the course of employment and, second, the Department of Labor is without jurisdiction in view of the fact that the accident in this case occurred on board a boat in a navigable stream; we contend that the catastrophe in this case was purely a marine disaster.

Hearing before The Industrial Board, April 27, 1933.
Present—Referee B. W. Nye, Esq.,

Appearances:

Claimant in person, represented by Max Leichtman on behalf of Slavin & Leichtman.
Mr. W. L. O'Brion, representing the employer and the carrier.

Mr. O'Brien: I think on the question of jurisdiction, I wish to make a preliminary objection on that score.
The Referee: The claimant is present. Be sworn.

EDWARD HEANEY, claimant, being duly sworn, testifies as follows:

OBJECTIONS TO ACTION

Mr. O'Brien: May I note for the record certain specific [fol. 21] objections too? On the question of jurisdiction, the insurance company objects to this hearing, because the subject matter and the inquiry is not within the jurisdiction of the Commission. The question that is involved is that the accident occurred in navigable waters in the United States, and this case is subject only to the Admiralty jurisdiction of the United States. I also wish to make the objection that the claimant was not at the time of the occurrence, an employee of this employer—the P. J. Carlin Construction Company. He was not then engaged in the course of the employment—and the injury did not arise out of and in the course of the employment.

The Referee: I will reserve on your motions. Overruled, for the time being.

Mr. O'Brien: Exception.

Direct by Mr. Leichtman:

Q. What was your occupation on September 9, 1932?

A. I was a bricklayer.

Q. How long had you been a bricklayer?

A. At this particular time I had been working there five days.

Q. You were employed by whom?

A. By the P. J. Carlin Construction Company.

Q. They were doing some work where,—on Riker's Island?

A. Yes.

Mr. O'Brien: I would like to have an objection to the last question. It calls for a conclusion on the day of the accident.

The Referee: That he was working for the Carlin Construction Company?

[fol. 22] Mr. O'Brien: That he was employed by the Carlin Construction Company on the day of the accident.

The Referee: Overruled.

Mr. O'Brien: Exception.

Q. Where did you live on September 9, 1932?

A. At 3018 Kingsbridge Avenue, Bronx.

Q. In going to work how did you go?

A. I came down on the trolley car down to 138th Street, and at 138th Street I transferred from one trolley car a few times to the 138th Street car, and I stopped at 136th Street, one block west of the East River, where I boarded the boat.

Q. The East River and what street?

A. 136th Street.

Q. You were on the Steamboat "Observation" at the time of the accident on September 9, 1932?

A. Yes.

Mr. Leichtman: Will the carrier concede that this is an exact copy of the bids between the contractors and the City of New York? I want to point out that this was part of the contract,—page 14.

Mr. O'Brien: I will concede that that was a clause under the general conditions for all contracts applying to the five contracts entered into by the City.

Mr. Leichtman: You will concede that that applied to the P. J. Carlin Construction Company?

Mr. O'Brien: That it applied to all the contracts who—all the contractors who contracted with the City, including the P. J. Carlin Construction Company. It was not a par-
[fol. 23] ticular clause of the P. J. Carlin Construction Company,—but of the general contract with all the contractors.

Mr. Leichtman: It is on their contracts, page 14, under the heading of transportation: Each contractor shall investigate the existing means of transportation to and from Rickers Island. The City shall not be held responsible for providing regular ferry service. The contractor must assume the responsibility of the transportation from mainland to the island of men and material for all work done under this contract.

Mr. O'Brien: My objection was not to the words of the clause, but to all the evidence, upon the ground that it is a contract between the contractors and the City of New York.

The Referee: You do concede, however, that it was a part of the contract?

Mr. O'Brien: Between the five contractors and the City of New York. It was a clause in each contract. I object to the materiality of the relationship to this bearing.

The Referee: Overruled. You may have your exception.

Mr. Leichtman, cont'g:

Q. Now, were you given any instructions by any one on behalf of the P. J. Carlin Construction Company as to how you were to go to Rikers Island, and from there to the shore?

A. Yes.

Q. Who gave you the instructions?

A. The foreman,—Gene Faust.

[fol. 24] Q. What were these instructions?

A. That we should take the Steamboat "Observation". Not to ride on the City ferry.

Q. Was there anything further said regarding the means of transportation?

A. Yes. They were to be given ten cents for our fare.

Q. Was anything said as to what would happen to you if you were to use the City ferry?

A. We were not allowed to use it.

Q. Was there anything said to you about what would happen if you used any other means,—other than the "Observation"?

A. We were absolutely forbidden to ride on the City boat. We had to use the "Observation".

Q. I show you a paper. Did you ever see this before?

A. Yes.

Q. Where did you see it?

A. On the time shed. I should say it was in the center of the operations at that time on Rikers Island.

Mr. Leichtman: I offer that in evidence.

Mr. O'Brien: That is objected to as incompetent, irrelevant and immaterial.

The Referee: Overruled. Received in evidence.

Mr. O'Brien: Exception.

The Referee: That is marked Exhibit 1, as of today's date.

Q. I show you another paper, and ask you if you have ever seen that before?

A. Yes.

Q. When and where did you see that?

A. It was posted on the time shanty.

Q. At the time you were working for the P. J. Carlin Construction Company?

A. Yes.

[fol. 25] Mr. Leichtman: I offer that in evidence.

Mr. O'Brien: Objected to as being incompetent, irrelevant and immaterial.

The Referee: Overruled. Received in evidence and marked Exhibit 2 as of this date. I think perhaps if you identified your Exhibit 1 a little more, Mr. Leichtman, it might be more valuable,—where he got it from?

Mr. O'Brien: Exception to the last ruling.

Q. I show you Exhibit 1 and ask you where you received this? That was after your accident?

A. Yes. It was received at the union in union headquarters.

Q. Who gave it to you?
A. Mr. Smith, our delegate.
Q. Can you get him here?
A. Yes.
Q. Outside of the Steamer "Observation," what other means of transportation was there from the Bronx to Rikers Island?
A. The City ferry.
Q. You have testified as to the orders regarding the City ferry. What was the conversation with the foreman?
A. That we couldn't use the City ferry.
Q. When were you told by your foreman that you should not use the City ferry but the "Observation"?
A. The day we were hired.
Q. What day was that?
A. That was my fifth day working. I was working there five days.
Q. The day of the accident was the first,—fifth day you were working?
A. I hadn't started to work that day. It would have been my sixth day.
[fol. 26] Q. What were your wages with the P. J. Carlin Construction Company?
A. $1.65 an hour.
Q. How many hours were you to work a day?
A. Eight hours.
Q. How many days were you to work a week?
A. Five days, I worked.
Q. What daily amount would that make?
A. $13.20 a day.
Q. At the time of the accident, were you rendered unconscious?
A. Yes.
Q. When you recevered consciousness you found yourself in bed in the hospital?
A. When I regained consciousness I found myself on the floor of the hospital.
Q. What hospital?
A. Lincoln Hospital.
Q. How long did you remain there?
A. Two weeks.
Q. After that where did you go?

A. To the Burke Foundation.

Q. Where is that?

A. In White Plains. I was sent there and in about three weeks I developed a toothache, and they had to send me home.

Cross by Mr. O'Brien:

Q. At the time of this occurrence you were on the Steamer "Observation"?

A. Yes.

Q. The "Observation" was navigating what water?

A. The East River.

Q. At the time she had left her dock?

A. Yes.

Q. She was out in the stream?

A. Yes.

Q. There was a dock or pier, and there were several other piers in the vicinity where other vessels were moored?

A. Yes.

Q. And this water,—the East River was where she was making regular trips,—and on this water there were sailing [fol. 27] craft and vessels of various kinds?

A. Yes.

Q. And the "Observation" made various trips during the course of the day from East 136th Street on the East River over to Rikers Island?

A. Yes.

Q. Trips over and trips back?

A. Yes.

Q. When this explosion occurred, you were thrown into the river?

A. Yes.

Q. Regularly when you went from your house to your work, you took the trolley car that you have spoken of,—or subway? Which was it?

A. I could do either. I usually took the trolley car.

Q. You took the trolley car down to a point near the pier?

A. One block.

Q. And then walked over to take the boat?

A. Yes.

Q. And for your transportation you paid the regular fare, five cents?

A. Yes.

Q. On the "Observation" you paid that?

A. Yes.

Q. That was ten cents for the round trip?

A. Yes.

Q. Which gave you the right to go back on the boat when your work was over for the day?

A. Yes.

Q. You were doing no work on the boat?

A. No.

Q. Were you standing or sitting there—on what part of the boat? What were you doing?

A. I was standing.

Q. On what part of the boat?

A. On the lower deck.

Q. The Municipal ferry boat also ran from the Bronx over to Rikers Island?

A. Yes.

[fol. 28] Q. And that ferry boat left from the point near where the "Observation" left?

A. 138th Street.

Q. Two blocks away?

A. Yes.

Q. Did you ever ride on the Municipal ferry boat at any time?

A. No. Never.

Q. Did you ever have occasion when your work continued beyond the regular trip, to go back on the Municipal ferry boat?

A. No.

Q. You know that that frequently happened to some of the other men?

A. I only know of one case.

Q. You do know of one case where it happened?

A. Yes.

Q. But as a rule you got through in time to go and take the Steamer "Observation"?

A. Always.

Q. What time were you supposed to start your work over at the island?

A. Eight o'clock.

Q. This accident happened a little after eight o'clock, didn't it?

A. Yes.

Q. If your work was supposed to start in the morning at eight o'clock,—your work on the island, how did it happen you were taking this eight o'clock boat?

A. I just miss the half past seven boat by about two seconds.

Q. On the other days when you worked over there when you got to the island,—would you get any sort of check that you returned to the timekeeper's office at the end of the day?

A. Yes.

Q. You wouldn't go to work in the morning from the "Observation" without going to the timekeeper's office when you reached there,—to report?

A. We would report first.

Q. And then they would give you some sort of identification check?

A. Yes. They would hand you a brass check.

[fol. 29] The Referee (Int'g): Then when you got the brass check,—after you got the brass check you would be ready to start in working?

Claimant: Yes.

The Referee: In other words, you had to get the brass check preliminary to starting your job?

Claimant: Yes.

Mr. O'Brien, cont'g:

Q. Then when you finished your day's work what did you do with the brass check?

A. Dropped it into the time office in a box that was there to receive it.

Q. At the time you were quitting?

A. Yes.

Q. Your pay began at the time that you got the brass check and ended at the time you turned it in?

A. Yes.

Q. Now this ten cents fare that you paid on the "Observation", you paid that out of your own pocket?

A. Yes.

Q. You were not reimbursed for that at all?

A. No.

Q. In reference to Exhibit 1 of today, the paper that was put in evidence,—when did you get this?

A. I just can't tell you when I got that.

Q. Did you ever see this before Smith gave it to you?

A. Yes.

Q. Where did you see it?

A. Posted on the time shanty.

Q. Was the other document, Exhibit 2, given you at the same time?

A. Yes.

Q. Had you ever seen this paper before it was given to you?

A. Yes.

Q. How many trips did this Steamer "Observation" make in the morning?

A. One about half past seven,—one about a quarter to [fol. 30] seven, and one at eight o'clock.

Q. Then going back in the afternoon, there were also various trips when you came back from work?

A. One about a quarter to five, one about a quarter after five.

Q. Were there times when the boat went over at other times?

A. I don't think so.

Q. The only time you rode on it——

A. (Int'g) The only time it went over to the island at other times was when we knocked off early on account of rain,—it would come over in that event.

Q. Then it would make trips at other times?

A. Yes. It would only make trips to take us fellows off the Island.

Redirect by Mr. Leichtman:

Q. Were you ever given permission by the foreman or any one from the P. J. Carlin Construction Company to use the City Boat?

Claimant: No.

Mr. Leichtman: Did you ever use the City boat?

Claimant: No.

The Referee: As far as you know, was the Steamer "Observation" used for any other trips at that time,—other than those trips that you have mentioned for these employees,—anywhere else around the city?

Claimant: Yes, on Sunday it went out and took special excursions.

The Referee: On week days, did it?

Claimant: No.

[fol. 31] Mr. O'Brien: Do you know that this boat made moonlight excursions?

Claimant: Yes, you are right. I heard that.

Recross by Mr. O'Brien:

Q. On this boat, there were various classes of workmen,—that is, there were bricklayers,—iron workers and men in different trades and men working for different employers when they got to the island?

A. Yes.

Q. They were not simply bricklayers?

A. No.

Q. This boat,—the "Observation", was used by the various workers,—by all the workers employed on the construction of the Rikers Island Penitentiary?

A. Yes.

Q. You were asked if your employer ever gave you permission to ride on the City ferry? Did you ever ask him?

Mr. Leichtman: I object to the question. It is immaterial.

The Referee: Overruled.

A. Well, no. I never ased him. I figured——

Q. (Int'g.) The question is answered. You never asked him.

A. No.

Q. This Steamboat "Observation" was how big a boat?

A. I couldn't say.

The Referee: You will stipulate over eighteen tons?

Mr. O'Brien: Yes.

The Referee: That is about all you care.

Mr. O'Brien: Was there a rating permitting her to carry two hundred and fifty passengers?

[fol. 32] Mr. Leichtman: Yes. It was a large boat. We concede that.

Mr. O'Brien: It was conceded on the record that it was a large steam passenger boat, with a capacity of two hundred and fifty passengers.

Mr. Leichtman: We concede it was a large steam boat, which could carry two hundred and fifty passengers.

The Referee: There is no question at all that the claimant was disabled for a time,—totally disabled? Any question about that?

Mr. O'Brien: No, I don't think there is.

The Referee: If you will stipulate that there is a certain disability as the result of this accident,—so that if jurisdiction is held I can make an award and you can take your appeal,—I know you are not going to abide by my decision,—seeing that will save you the question of medical expenses for both of you until you get your question of jurisdiction——

Mr. O'Brien: I will stipulate it was at least five weeks.

The Referee: At twenty-five dollars at the maximum rate. You can make that a tentative rate, and you can also stipulate that in the event of the final award, the proper rate will take that into consideration. That means that you will be credited with that.

[fol. 33] Hearing before The Industrial Board May 5, 1933.

Present—B. W. Nye, Referee.

Appearances:

Wm. L. O'Brion, Esq., representing employer and insurance carrier, accompanied by W. B. Davis, Esq.

Slavin & Leichtman, 11 W. 42nd Street, New York, N. Y., attorneys for claimant; Mr. Max Leichtman, of counsel.

The Referee: Do you want to offer in evidence part of the specifications, counsel?

Mr. Leichtman: Yes, sir. It is practically conceded that was in the contract, the part I want to put in.

The Referee: Yes. Is that a copy you can let us take, not only for this case but for other cases?

Mr. Leichtman: Yes, sir. I have finished with it as far as this record is concerned.

The Referee: Was this read?

Mr. Leichtman: Clause 14 was read in.

James Smith, 1610 Mahan Avenue, Bronx, N. Y., being duly sworn, testified:

Direct by Mr. Leichtman:

Q. What is your occupation, Mr. Smith?

A. Business Agent for Bricklayers' Union, Local #37, Bronx, New York.

Q. You know Mr. Heaney the claimant in this case?
A. I do.
[fol. 34] Q. I show you this paper, marked "Exhibit 1," ask you if you ever saw that paper before?
A. Yes, sir, I saw that paper. I saw one similar. I saw that one or one similar.
Q. Did you give such paper to Ted Heaney?
A. Yes, that or another one.
Q. Where did you first see that paper?
A. I saw those papers or similar ones to it, on what they call the tool house on Rikers Island. I gave them to Brother Heaney then, too.
Q. About what time of the year—what time of the year did you see them on that tool house on Rikers Island?
A. I had seen them day in and day out previous to the explosion.
Q. Prior to the month of September, 1932?
A. Yes, sir.
Q. For how long a period had you seen this posted?
A. I had seen them posters. I go over on that island about every other day or so. I saw them posted there a few days. I would look them over when I pass. They were posted up at the tool house, I don't say just them but others similar to them.
Q. Did you make your visit to the island from the time that P. J. Carlin started to work there?
A. Before I took office the job had started. I started last January 5th, one year ago.
Q. From January 5th did you start to make your visits?
A. I did.

Mr. O'Brion: This is 1932?
Witness: Yes, sir.

Q. I show you another paper, and ask you if you ever saw this or a similar paper in the tool house?
A. Yes, sir. I am sure that's the one I gave to Brother Heaney. That's the second one I gave to Brother Heaney.
[fol. 35] Q. Where did you get the two papers you gave to Mr. Heaney?
A. One of my shop stewards, by the name of Frank Delapana took them off the toolhouse the morning of the explosion and gave them to me, and said, "The men might need those when their case comes up in court," or words similar to that.

Q. This toolhouse on Rikers Island, where was it, or whose was it?

A. J. P. Carlin.

Q. J. P. Carlin kept the tools in that toolhouse?

A. What we call the toolhouse is a shack where the bricklayers put their tools at night and their clothes and lock it up. The shop steward keeps the key. No one can go in unless the shop steward.

Q. This was a toolhouse of the employees of P. J. Carlin?

A. This was one of them.

Cross by Mr. O'Brion:

Q. Mr. Smith, you say those papers were handed to you by someone else?

A. By one of my shop stewards, Delapana.

Q. Was he employed regularly on the island, or was he employed by the union?

A. He was employed regularly on the island.

Q. Did he give you any other paper besides those two papers?

A. Just two papers.

Q. When did you give them to Mr. Heaney?

A. Shortly after he came out of the hospital.

Q. That's approximately how long after the explosion?

A. I just don't recollect that. I didn't know I was going to be called down here.

Q. Can't you give it to us approximately?

A. I guess he was in the hospital.

Q. I am not asking you that. I am asking approximately how long after the explosion you gave him the paper?

A. I would say possibly three months after.

[fol. 36] Q. Have you seen them at any time since you gave them to him?

A. No, I have not.

Q. Are you sure these are the two papers you gave him?

A. (Peruses same.) Yes, I am sure. I am sure after reading them.

Redirect by Mr. Leichtman:

Q. You know, Mr. Smith, the contents of those two papers were posted on the toolhouse of Rikers Island?

A. Either they or similar ones. If I recall right—I am not positive of this but I believe there was a little bulletin

board down towards the ferry, if I remember right, and I think I have seen similar posters on them. I won't swear to that statement I just made.

Q. You recall this morning on the toolhouse you did find, see papers regarding the "Observation"?

A. Yes, sir.

JOHN FRANCIS CARLIN, Bright Waters, L. I., being duly sworn, testified:

Direct by Mr. O'Brion:

Q. Mr. Carlin, are you an officer of the P. J. Carlin Construction Company?

A. I am.

Q. And were you such officer in the year 1931?

A. I was.

Q. What office do you hold?

A. Treasurer and secretary.

Q. Did you hold such office at that time?

A. I did.

Q. Did you enter into a contract—that is, did the P. J. Carlin Construction Company enter into a contract with the City of New York in connection with any work being [fol. 37] performed on Rikers Island?

A. Yes, it did.

Q. Where is Rikers Island?

A. It is about opposite 140th Street. I should say between there and Long Island City.

Q. In the East River?

A. In the East River.

Q. How far is it from 136th Street, the Bronx, to Rikers Island?

A. Approximately one mile or two miles—from one to two miles.

Q. Is Rikers Island owned by the City of New York?

A. I believe so; yes, sir.

Q. What institution is there?

A. The penitentiary building.

Q. Are there any other buildings on the island except those connected with the penitentiary?

A. I think not.

Q. The contract which was entered into with the City of New York, will you please state whether that contract was

entered solely by your company or were there other companies contracted with the city?

Mr. Leichtman: I object to it on the ground it is irrelevant and immaterial.

The Referee: Overruled.

Mr. Leichtman: Exception.

Witness: There were other contractors in the City of New York engaged in the same work.

By Mr. O'Brion:

Q. How many were there altogether?

A. Five.

Q. Who contracted with the City?

A. Who contracted with the City separately?

Q. The proposals for those contracts were all contained in a bound printed volume, were they not?

A. Yes, sir.

[fol. 38] Q. And in that contract there were certain clauses entitled "General Conditions For All Contracts"?

A. That is correct.

Q. And those conditions applied to all five contracts?

A. Yes.

Q. And was Clause 14 in the "General Conditions for all Contracts" the clause entitled "Transportation" which has been put in evidence here? Was that a clause which applied to all of the five contracts?

A. It did. It was in each of the five contracts.

Q. The contracts with the different contractors were numbered, were they not?

A. Yes, sir.

Q. You were contractor under what contract?

A. Contract number one.

Q. That did not include the power plant, plumbing work, heating and refrigeration nor electrical work?

A. It did not include any of those.

Q. Who were the other four contractors with the City?

A. The Arc Electric Construction Company; Charles Darmstadt; Edward B. McGovern; Erickson Equipment Company. You asked for the others?

Q. What was the date of your contract with the City?

A. December 29th, 1930.

Q. At that time was there a ferry which ran from the Bronx to Rikers Island?

A. Yes, there was.
Q. And that ferry was what?
A. Municipal Ferry.
Q. I believe you stated there are no buildings on Rikers Island except those connected with the penitentiary?
A. There are none that I know of.
Q. Subsequent to the time when you executed the contract with the City did you enter into any contract with anyone in reference to the steamship "Observation"?
A. We did.
[fol. 39] Q. With whom was that contract made?
A. George I. Forsythe.
Q. Have you a copy of that contract with you?
A. I have, yes, sir.
Q. Will you please produce it?

Mr. O'Brion: I offer it in evidence.

By Mr. Leichtman:

Q. This is an exact copy of the original, Mr. Carlin?
A. Yes.

The Referee: Received, marked "Exhibit 1" as of this date.

By Mr. O'Brion:

Q. How was that contract accepted by George I. Forsythe, in writing or orally?
A. It was accepted orally.
Q. Was that the contract under which George I. Forsythe was operating the steamship "Observation" on the date of the explosion?
A. It was.

Mr. Leichtman: I object to the form of the question. I will allow it as to whether——
The Referee (Int'g.): Overruled.
Mr. Leichtman: Exception.

By Mr. O'Brion:

Q. Did the P. J. Carlin Construction Company own the steamship "Observation"?
A. It did not.
Q. Did it employ any of the crew?
A. It did not.

[fol. 40] Mr. Leichtman: That is objected to. The contract speaks for itself.

The Referee: Overruled.

Mr. Leichtman: Exception.

By Mr. O'Brion:

Q. Do you know whether the Municipal Ferry was used from time to time from the time you entered into the contract with the City to convey workers to Rikers Island?

Mr. Leichtman: Objected to as incompetent, irrelevant and immaterial, not binding on Heaney.

The Referee: Overruled.

Mr. Leichtman: Exception.

Witness: It was used at times.

Mr. O'Brion: Until the steamship "Observation" began running between East 136th Street and Rikers Island how did the men get to and from the island for their work?

Mr. Leichtman: Objected to as incompetent, irrelevant and immaterial.

The Referee: Overruled.

Mr. Leichtman: Exception.

Witness: By the Municipal Ferry.

Mr. O'Brion: Mr. Carlin, did the P. J. Carlin Construction Company operate or control the Steamship "Observation"?

Mr. Leichtman: Objected to.

Mr. O'Brion: In its navigation as a ferry from East 136th Street to Rikers Island?

Mr. Leichtman: Objected to as calling for a conclusion.

[fol. 41] The Referee: Yes, I think that does. I will sustain the objection.

Mr. O'Brion: I may have an exception to your Honor's ruling?

The Referee: Yes.

Mr. O'Brion: Did the P. J. Carlin Construction Company pay the wages of any of the crew of the "Observation"?

Mr. Leichtman: Objected to. There is a contract in evidence which defines relationship between the "Observation" owners and P. J. Carlin. I don't think we should have any evidence on that.

The Referee: Do you claim, Counselor, there is any relationship other than exists by this contract, "Exhibit 1"?

Your question, in a way you are asking for a construction of this contract. I assumed upon receipt of "Exhibit 1" that stated the relationship between the owners of the "Observation" and P. J. Carlin Construction Company. This testimony is designed either to construe this contract or as to various terms, I don't know which.

Mr. O'Brion: If the claimant's attorney will concede that that contract limits the relations there will be no need for any other questions on that.

Mr. Leichtman: I don't think any such concession should be called for. Mr. Carlin has testified that contract was in effect at the time the "Observation" was running. That's his testimony.

The Referee: True!

Mr. O'Brion: There has been an effort, Mr. Commissioner, apparently by the introduction of the Exhibits One [fol. 42] and Two, to show some connection between the P. J. Carlin Construction Company and the "Observation". At least it is possible he will argue from that fact that there was, notwithstanding this contract, something in the nature of operations or control. So I think it is clearly competent for me to show by this witness what the facts were in that connection.

The Referee: As the record stands at the present moment I should not look beyond this to define the relationship. He is prepared to show the relationship between the owners of the "Observation" and the operation of the "Observation" and the P. J. Carlin Construction Company. All of the testimony I have sustained the objection, has been upon the ground I considered it was either to vary the terms of this contract or to construe it. That's the theory on which I have excluded it.

Mr. O'Brion: In view of your Honor's statement, I withdraw the last question. You may examine.

Cross by Mr. Leichtman:

Q. Mr. Carlin, were you personally at Rikers Island during these operations?

A. Very seldom.

Q. This is Mr. Heaney. Do you know him?

A. Yes, I do.

Q. Did you ever give Mr. Heaney instructions as to how he was to go to and from Rikers Island?

A. Never.

Q. Did you ever tell him he had permission to use the City ferry?

A. I did not.

[fol. 43] Q. How long before this explosion had the men employed by you been going back and forth from Bronx to Rikers Island on the Steamship "Observation"?

A. They were going across at two different periods, one for, I think four months immediately preceding, and for about a similar period some time previous to that.

Q. So that for four full months prior to the time of the explosion the "Observation" had been used as the exclusive means of getting the men to and from the island?

A. I don't know whether the City ferry was used during that period or not.

Q. Do you know whether signs were posted on the toolshed advising the men as to the hours the "Observation" made the trips and advising them as to their conduct on the "Observation"?

A. No, I never knew any signs had been posted. Our field office prepared a schedule in accordance with that contract. That was supplied to George I. Forsythe.

Q. Did you ever give your foreman or any of the men, give instructions how the men were to travel to and from Rikers Island?

A. No.

Q. Did anybody else ever give such instructions?

A. Not that I know of.

Q. Have you your records with you to show how much money your company paid to George I. Forsythe, or how much was paid by George Forsythe to your company?

A. No, I haven't.

Q. Do you know how much was paid either way?

A. No.

Q. Your firm were the general contractors there?

A. We were general contractors for the contract number one.

Q. Right! And you had various sub-contractors?

A. Yes.

[fol. 44] Q. Mr. Carlin, do you know if notices were posted in conspicuous places on Rikers Island stating your firm was carrying compensation insurance?

A. I think so. I think that is very likely. I don't know it personally, if that is your question.

Q. It was the practice of the company to post such notices in a conspicuous place?

A. Yes. I understand it to be a matter of law.

Q. Did Mr. Heaney ever send you a notice to the effect he would not be covered by the terms of the Compensation Law?

Mr. O'Brion: That is objected to as incompetent, irrelevant and immaterial.

The Referee: Overruled.

Witness: Will you repeat it?

Mr. Leichtman: Did Mr. Heaney ever send you a notice he elected not to be covered by the terms of the Workmen's Compensation Law?

Witness: I never saw such notice. I don't know of any.

By the Referee:

Q. Who was the man in charge?

A. Our superintendent at the island?

Q. Yes.

A. James Bell.

Q. Do you know whether he gave the men any instructions as to the means of transportation to and from the island?

A. I believe he did not.

Q. You have no knowledge on that subject?

A. I have no personal knowledge.

Q. Did you require your sub-contractors to send your men by the "Observation"?

A. No, I didn't tell them anything about it.

[fol. 45] Q. It is a fact the City ferry was made use of only in the times of emergency?

A. It was made use of at the start of the contract altogether, and then there were various times I think where it was used in emergencies.

Q. Did you ever have any conversation or communication with the City or officials of the City to the effect the employees of contractors or subcontractors engaged in the work were not to use the City ferry?

A. Yes, we had instructions from them.

Q. It is a fact, is it not, the City ferry charged no fare?

A. I believe so. It charges no fares.

Q. It is also a fact the men riding on the "Observation" were required to pay fares?

A. The fare was charged to them.

LESTER ALOYSIUS FORSYTHE, 136 Belmont Avenue, West Brighton, Staten Island, being duly sworn, testified:

Direct by Mr. O'Brion:

Q. Are you the son of George I. Forsythe, deceased?

A. Yes, sir.

Q. Were you employed by him in connection with the business operations of the Steamship "Observation"?

A. I was.

Q. Do you know the contract under which the Steamship "Observation" was being operated at the time of the explosion?

A. Yes, sir.

Q. I hand you a document marked "Exhibit 1" of this date, and ask you to examine it and state whether or not that was the contract under which the boat was being operated?

A. Yes, this is a copy of the contract.

[fol. 46] Cross by Mr. Leichtman:

Q. Mr. Forsythe, what was your position?

A. I was engaged in procuring business for the boat.

Q. Did you ever travel on the "Observation"?

A. Yes, sir.

Q. Did you ever travel on the "Observation" while the men employed by Carlin and other contractors were being transported there?

A. Yes, sir.

Q. Who collected the ten cent pieces from these men?

A. Sometimes our deckhand and sometimes the collector.

Q. Who is the collector?

A. The last collector?

Q. When you say "the collector" whom do you mean?

A. The collector was the man we assigned to that work.

Q. Did you ever get the money from any employee of P. J. Carlin & Company? I mean in a lump sum?

A. Yes, we take the money from the collector each morning.

Q. Isn't it a fact most of the time one of the representatives of P. J. Carlin did give the collector the money and turned it over to you?

Mr. O'Brion: That is objected to as calling for a conclusion, is incompetent, irrelevant and immaterial.

The Referee: Overruled.

Witness: The man who collected the fares on the boat did so at our solicitation.

Mr. Leichtman: I move to strike that out.

The Referee: Granted.

Mr. O'Brion: Exception.

Mr. Leichtman: My question was, isn't it a fact most of [fol. 47] the time one of the representatives of P. J. Carlin & Company collected these ten cent pieces and turned them over to you?

Mr. O'Brion: Same objection.

The Referee: Overruled.

Mr. O'Brion: Exception.

Witness: He was employed by us when making collections, not by P. J. Carlin.

Mr. Leichtman: I move again to strike it out as not responsive.

The Referee: It is not responsive, but I will not strike it out. Continue with that.

Mr. O'Brion: Your Honor did or did not strike it out?

The Referee: I did not strike it out. It does not answer the question at all as a matter of fact.

Witness: I really wouldn't know who the collector was employed by, whether he was employed by Carlin or Darmstadt or what company.

Mr. Leichtman: Do you know who generally turned the money over to you?

Witness: The last collector was Miller.

By Mr. Leichtman:

Q. Don't you know Miller was employed by J. P. Carlin & Company?

A. Not for sure I do not.

Q. You are not certain?

A. No.

Q. Was Miller one of your deck hands?

A. No.
Q. Was Miller one of your crew?
A. No.
Q. The only relationship you had with Miller was that Miller turned the money over to you or your representative?
A. No, Miller was employed or engaged by my father to collect the fares each morning.
[fol. 48] Q. Were you present when this employment arrangement was made between your father and Miller?
A. I was very frequently present there in the morning.
Q. Were you present at the time the employment arrangement was made?
A. No, I don't think I was.

Mr. Leichtman: I move to strike out "Miller was employed by my father to collect fares" as being purely hearsay.
The Referee: It will have to go out without he can explain how he has the knowledge. The motion is made to strike out that answer because you have testified you were not present when the contract was entered into with Miller. How do you know your father had a contract with Miller?
Witness: I knew Miller and knew he knew most of the workmen employed on Rikers Island. I know the reason my father selected him was that it wasn't necessary for him to see the passes for the working slips in the morning and there was no delay in the line. He just collected the fares.

By the Referee:

Q. How did Miller know the men who worked on Rikers Island?
A. He had been employed there for some time.
Q. On Rikers Island?
A. Yes.
Q. By whom?
A. I don't know what company he was employed by.

Mr. O'Brion: On the island, I will concede he was employed by Carlin.
[fol. 49] The Referee: Counsel wants to know how it is you know he was working for your father?
Witness: Because Miller used to turn the receipts over to me.

By Mr. Leichtman:

Q. That's all you know about it. You used to get the receipts from Miller?

A. I know more than that about it.

Q. Tell us what more you know?

A. We had other collectors besides Miller. The arrangement was that Miller would, or whoever the collector would be, would collect the fare in the morning, and on the last trip over would turn over to us the amount collected.

Q. You had a brother, Alexander, did you?

A. Yes.

Q. Is he still alive?

A. Yes.

Q. As a matter of fact he was the one who was very frequently on the boat, wasn't he?

A. Yes, sir.

Q. He was there every day, wasn't he?

A. Yes, or most every day.

Q. Did you take care of the books for your father?

A. I did.

Q. At stated intervals did either your father give P. J. Carlin any money or did P. J. Carlin give your father any money?

A. The P. J. Carlin Company gave my father money.

Q. In addition to the moneys collected from these men?

A. That's right.

Q. You have no idea who this man Miller was, have you?

A. Yes, I know he was an employee on Rikers Island. I knew he knew most of the men who worked over there.

Mr. Leichtman: That's all.

[fol. 50] Redirect by Mr. O'Brion:

Q. The moneys that Carlin Company paid your father were to make good the guarantee under this contract which has gone in evidence?

A. That's right, the difference collected each day as against their guarantee.

Q. Was it part of your business in your employment for your father to make up the payrolls?

A. Yes.

Q. Did you make up the payrolls for the "Observation"?

A. I did.

Q. Do you know whether or not this man Miller was paid any sum by your father?

A. I do.

Q. How much?

A. He was allowed $3.00 per week.

Mr. Leichtman: I move to strike out "He was allowed $3.00 per week."

The Referee: Overruled.

Recross by Mr. Leichtman:

Q. Have you any books showing the business transactions about September, 1932?

A. Yes, I have.

Q. What are those books?

A. Most of them were subpœnaed or taken by the District Attorney of Bronx County about one week or ten days after the accident.

Q. Did you personally ever pay Miller $3.00?

A. I did.

Q. How often?

A. I paid him two or three times in July, during the period of time my father was off the boat.

Q. Your father asked you to give him the $3.00?

A. Yes, sir.

Q. It was in the nature of a tip, wasn't it?

[fol. 51] Mr. O'Brion: That is objected to, calling for a conclusion, is incompetent, irrelevant and immaterial.

The Referee: Overruled. That question is this, whether or not by reason of a contract or an understanding you were required to pay him that money or whether it was a mere gratuity. That's what he means by a tip. I want you to understand the question. The objection is overruled. You may answer.

Mr. O'Brion: Exception.

Witness: Will you repeat it?

The Referee: Whether you were under obligations to pay him that $3.00 by reason of an understanding or agreement with him or whether you gave it to him as a gratuity, as a tip without a right to demand it.

Mr. O'Brion: The same objection and exception.

The Referee: The same ruling.

Witness: Miller never demanded it of us.

By the Referee:

Q. Did you agree at some time to pay it to him?
A. Yes, we did.
Q. Did you tell him you would give him that amount of money for specific work?
A. Each morning if he would take care of the fare.
Q. Was it agreed you would pay him that money for certain specified designated work?
A. Yes.

By Mr. Leichtman:

Q. Did you fix the hours Mr. Miller was to work for you?
A. Except that he was there on the first trip in the morning and left the boat on the last trip.
[fol. 52] Q. He had to wait for the last trip?
A. Yes.
Q. You stated before you were not present when your father made arrangements with Miller?
A. No, I wasn't.
Q. When you say you promised to pay $3.00 per week you are not stating that of your own knowledge?
A. I paid him very frequently.
Q. All you know is you gave it to him?
A. Yes.
Q. Your father asked you to give it?
A. We carried him as part of the boat payroll. I make up the payroll. We charge $3.00 for Miller.
Q. You charged it up as expenses of the boat?
A. Yes.
Q. That wasn't because of any conversation you had with Miller? You didn't promise to give Miller $3.00?
A. No, I didn't hire him.
Q. You were not present when your father had the arrangements with Miller?
A. No.
Q. All you know is you were told to add $3.00 to the payroll and give it to Miller?
A. Yes, for his services each week.
Q. That's all you know?
A. Yes.

Redirect by Mr. O'Brion:

Q. You were not present, were you, when your father made the contract with the engineer of the boat?

A. No.

Q. But you know the engineer reecived a certain salary?

A. Yes.

Q. You were not present when your father made the contract with the deck hands of the boat?

A. No.

Q. You know the deck hands received a certain salary?

A. Yes.

Q. And you know the same thing as to Miller's $3.00?

[fol. 53] Mr. Leichtman: I object to that.

The Referee: Overruled, I will receive it.

By the Referee:

Q. How many trips did the "Observation" make per day to Rikers Island?

A. In the morning we made three trips, six—6:45; 7:30 and 8 o'clock.

Q. Did Miller make all three of these trips?

A. Yes.

Q. In the afternoon how many were there?

A. The first trip back was 4:30; 5 o'clock, between 5 and 5:15, and then 6 o'clock.

Q. Did Miller make all three?

A. Not the night trips.

Q. Only the morning?

A. Yes.

By Mr. O'Brion:

Q. Mr. Forsythe, during this time that the "Observation" was running between East 136th Street and Rikers Island, did she make any moonlight excursions?

A. Yes.

Q. How often?

A. On an average of two or three per week.

Q. What did she do on Saturdays or Sundays?

A. She always had excursions during the summer months, for the excursion season.

Q. But for the four months at least preceding this accident during the morning and evening the "Observation" was on hand to take Carlin's men to and from the Bronx to Rikers Island?

Mr. O'Brion: That is objected to as it is covered by the [fol. 54] contract, the time when the "Observation" should be doing that work.

Mr. Leichtman: I asked whether it was,——

Witness: From Monday to Friday.

The Referee: Overruled. I will receive it.

Mr. O'Brion: Exception.

Recross by Mr. Leichtman:

Q. Those three trips in the morning took how much of Miller's time?

A. Exclusive of his own traveling time to Rikers Island he was there from 6:30 until 8 o'clock, then he got off the boat on the last trip over.

Q. When you say he got off the boat on the last trip over what do you mean?

A. He left the boat on the Rikers Island side.

Q. When was the last trip?

A. 8 o'clock.

Q. It started from New York at eight?

A. Right.

Q. When did he reach Rikers Island?

A. Between 8:11 and 8:15.

Q. How far was the boat landing from J. P. Carlin's office or the place of work where the men reported?

A. I should judge about five minutes' walk.

Q. So that by taking this last trip the earliest Mr. Miller could arrive at his place of work was 8:20?

A. Yes, sir.

Q. And that was five days per week?

A. Yes, sir.

Mr. O'Brion: Your father, George I. Forsythe was killed in this explosion, was he not?

Witness: Yes, sir.

[fol. 55] By Mr. Leichtman:

Q. Mr. Forsythe, you actually was not engaged on the boat in any capacity?

A. I was manager.

Q. But you were not actually engaged on the boat?

A. I was there every Saturday and Sunday and every night we had a moonlight excursion.

Q. You were there every Saturday and Sunday and every time you had a moonlight excursion?

A. Yes. During the week when my father wasn't there I was there usually.

Q. Only when your father was not there you usually ran up?

A. Yes.

Q. How long did you stay when you ran up?

A. If I went in the afternoon I stayed until the evening. If I went in the morning, depending on what I had to do in the office. If there was nothing to do I remained on the boat.

Q. As a general rule you were the office man, that's where you stayed?

A. No, I took care of repairs on the boat and purchases of every type. People who were interested in chart-ing the boat for an excursion, I would arrange to meet them there and show them around.

Q. That was the nature of your work, general business manager?

A. Yes, sir.

Q. Mr. Forsythe, were not there some times when the men had to quit earlier because of rain or some other condition where they couldn't work?

A. Yes.

Q. That boat was available to take them at these times?

A. The boat was laying on Rikers Island. As a matter of fact we didn't wait until we were called. If there were signs of rain we sent the boat over and let it lay on the Rikers Island side. The reason it laid on the New York [fol. 56] side during the day was because the dock over there was in use.

The Referee: Do I understand paragraph 14 and paragraph 37, on pages 14 and 16 respectively are to be received in evidence? They have not been marked in evidence.

Mr. Leichtman: Fourteen was read into the record.

The Referee: And that's in evidence?

Mr. Leichtman: Yes, sir.

Mr. O'Brion: I had an objection, if I recall now, to it as being incompetent, irrelevant and immaterial. I concede it was part of the contract. The other section your Honor referred to is what?

The Referee: Thirty-seven.

Mr. O'Brion: Under the paragraph "Employes"?

The Referee: Yes.

Mr. O'Brion: Yes. That was a general condition applying to all contracts. I concede that is, but under the same objections, as not competent and material and relevant, and I take exception.

The Referee: The case is now submitted, is it?

Mr. O'Brion: If the Court please, I would like to have on the record a motion to dismiss.

The Referee: Yes. I anticipate both of you gentlemen want to submit a brief? I will let you submit your motion to dismiss with your brief.

[fol. 57] By Mr. Leichtman:

Q. Mr. Forsythe, did you know Mr. Bell?
A. The superintendent, yes, sir.
Q. He was superintendent of P. J. Carlin on this job?
A. Yes.

Hearing before The Industrial Board, November 8, 1933.
Present—Nelle Swartz, Member of Board.

Appearances:

Wm. L. O'Brion, Esq., Representing Employer and Insurance Carrier.

Slavin & Leichtman, Attorneys for Claimant, Mr. Max Leichtman, of Counsel.

COLLOQUY

Miss Swartz: This is for review on request of claimant's attorney of the action disallowing the claim on the ground of no jurisdiction and no accident arising out of and in the course of employment.

Mr. Leichtman: May I ask whether the file shows the three exhibits I offered in evidence at that time?

Miss Swartz: To what do you refer?

Mr. Leichtman: One was a notice the employer was carrying compensation insurance, and the other two,——

Miss Swartz (Int'g): This is one of those cases he was injured when the "Observation" blew up in the East River. Is that right?

Mr. O'Brion: Yes.

Mr. Leichtman: Yes.

[fol. 58] Miss Swartz: Question of admiralty jurisdiction. Whether the accident arose out of and in the course of employment are the points at issue?

Mr. O'Brion: Yes.

Miss Swartz: Mr. Nye disallowed the claim?

Mr. O'Brion: Yes.

Mr. Leichtman: He disallowed the claim on the ground of no jurisdiction; did not arise out of and in the course of employment. I don't see the notice. There is evidence a notice was posted to show the employer carried compensation insurance, a notice similar to this. I want to talk on that point, particularly because I did not emphasize the wording of the notice in my brief.

Mr. O'Brion: I don't recall that there was such a notice in evidence.

Mr. Leichtman: The notice was not offered in evidence, but I think the Board will take notice the form of the notice was approved or must be approved by the State Department and must be on record, the form of notice used by various insurance companies in the year of the accident, which form is still the same form. The first point we made was there was contractual relationship here between the employer and employee. The Carlin Company, the carrier's attorney says was only one of five contractors. As a matter of fact the evidence shows Carlin was the contractor, and the other people worked on the island for the sub-contractor of Carlin. There were five contractors in all, but Carlin was the contractor.

Miss Swartz: There is no use arguing this case if all those things are in the record.

Mr. Leichtman: Everything is in the record with the exception of one thing, I would like you to take notice of it.

Miss Swartz: I can't if it is not in the record.

[fol. 59] Mr. Leichtman: You can in my opinion because the State Law has provided,—if you can't take notice of it

I would like to have time to get evidence to show the notice posted by the employer.

Miss Swartz: When you speak of the employer?

Mr. Leichtman: Carlin, given to the employer by the insurance company, had these words: "The undersigned employer hereby gives notice he has complied with the provisions of the Workmen's Compensation Law and the rules of the Industrial Board of the State of New York, has secured a policy of compensation for his employees and dependents of employees engaged in the hazardous employment enumerated in such law and has elected to bring within the provisions of such law all employees whether engaged in such hazardous employment or otherwise, including employees engaged in maritime employment." If you will not take judicial notice of the fact that was the notice posted by all insurance carriers or given by all insurance carriers to their assureds I would like to have time to get definite proof it is the exact wording of the notice.

Miss Swartz: Is the policy in evidence?

Mr. Leichtman: No, it was conceded Carlin had it. The point raised by the carrier is the accident having happened on a navigable stream, no jurisdiction; that it is maritime tort. The point we make is, having happened on a river entirely within the State of New York, is one which is a matter of local concern. The Supreme Court of the United States has held where the duties were of a bricklayer compensation shall be the exclusive remedy even though the accident happened on a navigable stream, compensation goes. The Compensation Law does not limit the general [fol. 60] rights of the maritime law. The point I want to make this morning is this, that the insurance carrier and all carriers have taken the position in their notice they cover maritime accidents. Now, they take the position when, what they call a maritime accident has happened, that the Compensation Board has no jurisdiction.

Mr. O'Brion: There is no notice; no policy put in evidence in the record.

Miss Swartz: As I understand it, you are not asserting you did not cover the men on the island, are you?

Mr. O'Brion: No.

Miss Swartz: I think it is irrelevant. They are not denying they covered the men once they were on the island. Your statement is this was posted on the island on a shanty?

Mr. Leichtman: Yes.

Miss Swartz: You don't deny you cover them?

Mr. O'Brion: No. We complied with the law as to notice, but the particular wording of the notice I have no knowledge of, and I can't concede.

Miss Swartz: Why wasn't the policy made part of the record?

Mr. O'Brion: It wasn't inquired about at all.

Miss Swartz: This case, you appreciate, has considerable significance. I understand there are quite a few cases of injury and death. It is a case which will be considered by the entire Board because of its significance. I am inclined to reserve decision on the record as it stands today and bring it up at the Board meeting to discuss the question with the Board. If for any reason they are of the opinion additional evidence should be introduced, either the evidence which you indicate or the policy, I will have to put it back on the calendar for that purpose, if that's agreeable.

Decision reserved.

[fol. 61] EXHIBIT 1 OF APRIL 27, 1933

Received in Evidence, Referee Nye

The P. J. Carlin Construction Co.

Builders and Engineers

Rikers Island

Foot of East 134th Street, New York

Notice Regarding the Use of Ferry "Observation"

The Attention of All Men Using the Ferry Is Directed to the Necessity of Maintaining Order and Avoiding Confusion Particularly at Docking Time. A Few Individuals, Who, By Jumping Rails, Crowding the Gang Planks, Horseplay, and Disorderly Conduct, Create Elements of Danger to Themselves and All Others.

For Your Own Good, You Are Warned That Sharp Action Will Be Taken With Offenders—You are Subject to Being Discharged and Also Prosecuted.

Give the Captain a Break—He Will Give You a Quick, Safe, and Pleasant Trip If You Do.

The P. J. Carlin Construction Company, Inc., J. K. Bell, General Superintendent.

[fol. 62] EXHIBIT 2 OF APRIL 27, 1933

Received in Evidence, Referee Nye

P. J. Carlin Construction Co.

Memorandum

June 22nd. 1932.

Notice

Starting tomorrow morning the Steamer "Observation" will make an additional trip to Rikers Island at 6:50 A. M. This will be in addition to the usual 7:30 A. M. trip.

The P. J. Carlin Const. Co., Inc., J. K. Bell, General Sup't.

EXHIBIT 1 OF MAY 5, 1933

Received in Evidence, Referee Nye

June 26th, 1931.

Captain Geo. I. Forsyth, 104 Bement Ave., West New Brighton, Staten Island, N. Y.

DEAR SIR:

Superseding all previous correspondence, licenses and agreements which are hereby revoked and cancelled, you are hereby licensed to operate a ferry service for the trans- [fol. 63] portation of the men engaged upon the construction of the Rikers Island Penitentiary Building, for which we are the general contractors, upon the following terms and conditions,

(1) You are to operate the Steamer "Observation", which is warranted by you to be officially rated at 250 capacity by local steamboat inspectors, Custom House, N. Y., full crewed, full covered with adequate public liability and workmens compensation insurance, upon a schedule furnished to you by our Field Office, and calling for operation five days in the week only, from Monday to Friday inclusive.

(2) You are to be compensated therefor by collecting fares from the men at the rate of 10¢ a round trip. In the event that your fares do not reach the sum of $60.00 upon any given day, we shall reimburse you for the difference. Where your fares exceed $60.00 a day, you will pay the excess to us up to a point where we are reimbursed for any monies paid to you by us under this license.

(3) It is understood that we are in no way obligated to continue your services, which may be suspended or completely shut down at any time at our pleasure. It is understood that you will procure all landing permits except at the Rikers Island landing. This boat will be held for this service for twelve hours a day, and in the event that it becomes disabled, another boat will be immediately substituted of equal capacity, namely, 250, under the Steamboat Inspector's rating.

[fol. 64] (4) We understand that your boat is warranted to be in first class condition, with all necessary permits to operate in this service.

(5) It is understood, furthermore, that you will furnish a Surety Co. bond, guaranteeing performance on your part. We desire that you furnish this bond at once.

Please acknowledge this letter with your assent to all of its terms. We also wish you to send us certificates of your public liability insurance and workmen's compensation policies.

Yours very truly, The P. J. Carlin Construction Co.
(Signed) J. F. Carlin, Secretary.

JFC:K

Agreement

Agreement, made this 20 day of July, 1932 by and between The P. J. Carlin Construction Company, of 405 Lexington Avenue, New York City, New York, hereinafter called the Contractor and Albee Godfrey-Whale Creek Company, Inc. of Stewart Avenue & Townsend St., Brooklyn, N. Y. hereinafter called the Subcontractor.

The parties hereto for the consideration hereinafter named, hereby mutually agree as follows:

1. The General Contract.—Whenever the word "contract" is used in this agreement, it shall mean the Contract [fol. 65] between the Contractor and The City of New York, dated the 29th day of December, 1930, for furnishing the labor and materials required for Contract No. 1—General Construction Work, Rikers Island Penitentiary, including the proposal for bids, the bid, the bond, the contract and the specifications thereto annexed, also the drawings of the work, and the detailed drawings pertaining thereto, and bulletins.

The Contract is hereby made a part of this agreement, and all of the requirements, covenants, stipulations and restrictions contained therein, which are applicable to the work of the Subcontractor, are hereby made a part hereof, except as the same are hereby expressly modified.

2. Investigation by Subcontractor.—The Subcontractor hereby expressly declares and acknowledges that, before the signing of this agreement, he carefully read the same and the whole thereof, together and in connection with the Contract, including the drawings and specifications, and that he thoroughly understands the intent thereof; that he examined the site of the work and satisfied himself by his own investigation and research as to all of the quantities and conditions, and he will make no claim or demand upon the Contractor or upon the City by reason of any misunderstanding of the Contract, or by reason of any estimate, test or representation by an officer or agent of the Contractor or of the City.

3. Work to be done.—The subcontractor will furnish all labor, materials, tools and appliances and perform all the work required by or in connection with the Contract, and included in the Contract.

[fol. 66] 19. Insurance.—The contractor will, during the progress of the work, maintain insurance on the same against loss or damage by fire, the policy or policies to cover all work and materials incorporated in any building, and to be made payable to the Contractor and the several Subcontractors as their respective interests may appear.

The Subcontractor will provide and maintain Workmen's Compensation Insurance and Public Liability Insurance, such Public Liability Insurance, to be in the amount of Twenty-five thousand dollars for injury to any one person,

and Fifty Thousand Dollars ($50,000.00) Dollars for injuries in one accident, and the Subcontractor will furnish to the Contractor upon request, certificates showing such insurance.

Agreement

Agreement, made this — day of —, 1931, by and between The P. J. Carlin Construction Company, of 405 Lexington Avenue, New York City, New York, hereinafter called the Contractor and Albee Godfrey-Whale Creek Co. Inc., Stewart Ave. and Townsend St., Brooklyn, N. Y. hereinafter called the Subcontractor.

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The Contract is hereby made a part of this agreement, and all of the requirements, covenants, stipulations and restrictions contained therein, which are applicable to the work of the Subcontractor, are hereby made a part hereof, except as the same are hereby expressly modified.

2. Investigation by Subcontractor.—The Subcontractor hereby expressly declares and acknowledges that, before the signing of this agreement, he carefully read the same and the whole thereof, together and in connection with the Contract, including the drawings and specifications, and that he thoroughly understands the intent thereof; that he examined the site of the work and satisfied himself by his own investigation and research as to all of the quantities and conditions, and he will make no claim or demand upon the Contractor or upon the City by reason of any misunderstanding of the Contract, or by reason of any estimate, test or representation by an officer or agent of the Contractor or of the City.

3. Work to be done.—The Subcontractor will furnish all labor, materials, tools and appliances and perform all the work required by or in connection with the Contract, and included in the Contract under the following items and descriptions:

All labor and materials necessary to furnish and erect, all miscellaneous and ornamental iron required by the [fol. 68] drawings and as described in the specifications, Page 1-115, Paragraphs 1 to 10, to Page 1-128, Paragraph 176 inclusive, but does not include flag staff, Paragraphs 72 and 73; vault doors, Paragraphs 110 and 111; Steel plate partitions, Paragraphs 113, 114 and 115; Wire mesh, Paragraphs 116 to 121 inclusive; Mono rail, track and hoist, Paragraphs 154 to 162 inclusive; Metal equipment, Mess Halls, Paragraphs 173 to 176 inclusive, or as modified in the bulletins.

19. Insurance.—The contractor will, during the progress of the work, maintain insurance on the same against loss or damage by fire, the policy or policies to cover all work and materials incorporated in any building, and to be made payable to the Contractor and the several Subcontractors as their respective interests may appear.

The Subcontractor will provide and maintain Workmen's Compensation Insurance and Public Liability Insurance, such Public Liability Insurance, to be in the amount of Twenty-five Thousand ($25,000.00) Dollars for injury to any one person, and Fifty Thousand ($50,000.00) Dollars for injuries in one accident, and the Subcontractor will furnish to the Contractor upon request, certificates showing such insurance.

The Subcontractor also agrees to bear the cost of fire insurance called for in Art. XLVII, Page C-20 of the Contract in such proportion as the value of the work performed by him in accordance with this agreement, bears to the total value of the work done on the Contract.

[fol. 69] Transportation

14. Each Contractor shall investigate the existing means of transportation to and from Rikers Island. The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract.

Dock

15. The General Contractor shall investigate the docking facilities on Rikers Island. He shall consult with the officials of the Department of Correction, and if the facilities are found inadequate for his use, he shall construct other dock or docks. Should this be required, it or they must be built in accordance with the rules and regulations of the Department of Docks of the City of New York, and the Department of Correction.

16. If the Contractor should decide first to construct the Coal Dock called for under the Contract for General Construction, he may have the use of the present dock for the handling of materials and may omit the construction of the temporary dock called for under the preceding paragraph, provided that he completes the Coal Dock before using the existing dock.

17. The General Contractor shall permit the other contractors to use the dock or docks without cost. Other contractors shall cooperate with the General Contractor and make proper arrangements for the use of dock.

[fol. 70] Results of Borings

18. The City shall not be held as being responsible for any misunderstanding as to the depth or character of the excavations to be made, or the nature or amount of the work to be done. Any diagram, chart, plan or description of borings which may be submitted with the drawings, shall not, because of the well-under*t*sood difficulties under which such borings are made be held to be final and conclusive.

Co-Operation

19. Inasmuch as the completion of the work within the prescribed limit of time is dependent very largely upon the close and active co-operation of all those engaged therein, it is therefore expressly understood and agreed that each Contractor shall lay out and install his work at such time or times and in such manner as not to delay or interfere with the carrying forward of the work of other Contractors and the completion of the work within the time set forth in the contract. It is further agreed that in the event of any dispute arising as to possible or alleged inter-

ference between the various Contractors which may have to do with the progress of the work, that the same shall be decided by the Architects, whose decision as to party or parties at fault and manner in which the matter may be adjusted shall be binding and conclusive on all parties.

Employees

37. Nothing contained herein shall in any way lessen the responsibility for the Contractor from securing as sub-con- [fol. 71] tractors, competent firms, concerns or individuals in the respective lines, and from their being required to comply with all plans, specifications, instructions of the Architects, and with all General and special Conditions or requirements of the contract, precisely the same as the Contractor himself.

In Supreme Court of New York, Appellate Division

Order of Affirmance—Jan. 21, 1935

The above named appellants having appealed from the award of the State Industrial Board for which findings were signed in the office of said Board on or about the 7th day of July, 1934, whereby an award of compensation was made in favor of the claimant herein, and said appeal having come on to be heard in this Court, and having been argued by Isaac Frank, Esq., Assistant Attorney General, [fol. 72] for the State Industrial Board, and by William B. Davis, Esq., for the appellants, and due deliberation having been had thereon;

Now, on motion of John J. Bennett, Jr., Attorney General, attorney for the State Industrial Board, it is

Ordered, that the award of the State Industrial Board so appealed from be and the same is hereby unanimously affirmed with $79.55 costs to be paid by the appellants to the State Industrial Board.

(Signed) John S. Herrick, Clerk.

Ent. 1/21/35.

BEFORE INDUSTRIAL BOARD OF STATE OF NEW YORK

ORDER MAKING ORDER OF APPELLATE DIVISION THE ORDER OF STATE INDUSTRIAL BOARD

The above named P. J. Carlin Const. Co., employer and Travelers Insurance Co., insurance carrier, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the Industrial Board of the State of New York, for which findings were signed in the office of said Board on or about the 7th day of July, 1934, whereby compensation was awarded the above named Edward Heaney, and said appeal having been duly heard by said Court, and the said Appellate Division of the Supreme Court, having at a term thereof commencing on the 7th day of January, 1935, unanimously affirmed the award or decision hereto- [fol. 73] fore made by the Industrial Board of the State of New York, and the order of the said Appellate Division having been entered in the office of the Clerk of said Court on 21st day of January, 1935, and the papers on appeal herein together with a certified copy of said order of the Appellate Division having been duly filed, wherein said award of said Industrial Board of the State of New York was unanimously affirmed by the Appellate Division in the following terms:

Ordered, that the award of the State Industrial Board so appealed from be and the same is hereby unanimously affirmed with $79.55 costs to be paid by the appellants to the State Industrial Board.

It is ordered that the order of the Appellate Division in the above entitled matter be and the same hereby is made the order of the State Industrial Board therein, with interest from date of said award.

Dated New York, February 14, 1935.

Maud Swartz, Secretary. (Seal.)

IN COURT OF APPEALS OF NEW YORK

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the

[fol. 74] part of the appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A copy.

John Ludden, Deputy Clerk. (Seal.)

State of New York, Court of Appeals.

In Court of Appeals of New York

Notice of Appeal to Court of Appeals

Sirs:

Please take notice that pursuant to an order of the Court of Appeals of the State of New York, entered at a term thereof commencing on the 15th day of April, 1935, granting leave to the appellants to appeal to the said Court of Appeals, P. J. Carlin Construction Co., and The Travelers Insurance Company, hereby appeal to the Court of Appeals of the State of New York, from the unanimous order of affirmance made and entered in the office of the Clerk of the Appellate Division, Third Department, on the 21st day of January, 1935, and from the order and award of the State Industrial Board based upon the said order of affirmance and entered in the office of the State Industrial [fol. 75] Board on or about the 14th day of February, 1935.

This appeal is from the whole of said order, and of said award, and each and every part thereof.

Dated New York, May 8, 1935.

Yours, etc., E. C. Sherwood, Attorney for Appellants, Office & P. O. Address, 100 East 42nd Street, Borough of Manhattan, City of New York.

To John J. Bennett, Jr., Attorney General, The Capitol, Albany, New York. Joseph A. McLaughlin, Assistant Attorney General, 80 Centre Street, New York City. Slavin & Leichtman, 11 West 42nd Street, New York City.

[fol. 76] Clerk's certificate to transcript omitted in printing.

[fol. 77] Certificates of reporter and chief judge to opinion of Court of Appeals omitted in printing.

[fol. 78] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Claim of EDWARD HEANEY, for Compensation Under the Workmen's Compensation Law, Respondent,

v.

P. J. CARLIN CONSTRUCTION COMPANY et al., Appellants; STATE INDUSTRIAL BOARD, Respondent

(Decided November 19, 1935)

Appeal by the employer and the insurance carrier from an order of the Appellate Division, third department, which affirmed an award of the Industrial Board.

Permission to appeal was granted by the Court of Appeals.

E. C. Sherwood and William B. Davis for appellants.

John J. Bennett, Jr., Attorney-General (Henry Epstein and Roy Wiedersum, of counsel), for respondents.

OPINION

HUBBS, J.:

Claimant was injured by an explosion on a boat on which he was going to work. It is urged an award of compensation cannot be sustained because the maritime law applies.

In considering this case it is necessary to determine, first, whether it involves a contract matter or a tort matter and, secondly, if a contract matter, whether the contract was maritime in its nature. This is true because of the well-established rule enunciated by the Supreme Court of the United States.

"The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." (Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 476.)

If a tort matter be involved in this proceeding then since the accident occurred upon navigable waters, it would seem that admiralty would have jurisdiction. If it were a proceeding instituted against the shipowner for damages resulting from the explosion of the ship, without doubt a tort matter would be involved. It is not, however, such a proceeding. It is against the employer and is not instituted on the theory that a tort has been committed. As was said in State Industrial Commission v. Nordenholt Corp. (259 U. S. 263, 271), "an award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. • • • The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to com- [fol. 79] pensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrong doing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment." (Cf. Matter of Post v. Burger & Gohlke, 216 N. Y. 544; Matter of Doey v. Howland Co., 224 N. Y. 30.)

No recovery is sought against the employer in this case because of any wrong alleged to have been done by the employer. A recovery is sought as the result of injuries for which the statute, read into the contract, gives a right to recovery.

If the question of tort be not involved, then we are confronted with the question as to whether the contract of employment is maritime in its nature. The contract of employment was for the services of the claimant in the erection of a building. It was not a contract to do work upon a vessel in navigable waters nor even to do work remotely connected with any undertaking having to do with navigation or commerce. The presence of the claimant upon the boat was a mere incident of the contract of employment, it having been found as a fact that he was on the boat as an employee of the contractor against whom the award has been made.

Even though the part of the contract of employment which brought about his presence on the boat be deemed to make the contract of employment martime in its nature, the subject remains local in character and the applicability of the State compensation law quite possibly might be upheld in a Federal court under the exception to the general rule as to the applicability of maritime law which permits the application of a State statute where so doing will not "work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (259 U. S. 263, 274.)

The discussion of the general rules and exceptions thereto in State Industrial Commission v. Nordenholt Corp (supra) is most illuminating and it seems to clearly point the way to the proper disposition of this case. The claimant was not a maritime worker. He was not engaged at the time he was injured directly or indirectly in any work having to do with commerce or navigation. While he was injured on a ship in navigable waters, he was not a passenger in the general sense of the word and this proceeding is not instituted on the theory of any contract for carriage between himself and the owner of the ship. Though he paid his fare it may be assumed that his compensation for the work in which he was engaged was so adjusted as indirectly [fol. 80] to reimburse him for that expenditure. The contract of carriage was not made primarily for his benefit but under a requirement of the main contract of his employer for the transportation of his employees. By upholding the applicability of the Workmen's Compensation Law (Cons. Laws, ch. 67) under the facts in this case, no material prejudice can result to the characteristic features of the general maritime law. No effect will be had upon the established rules as to the applicability of maritime jurisdiction to questions arising between passengers and shipowners or maritime workers and the owners of ships or other employers engaged in maritime work. The matter is as much one of local concern as if the employee had been injured while at work on the building on the island. To permit claimant to succeed, it is not necessary to find any wrong-doing on the part of his employer, so that the question of the proper or improper operation of the ship is not

involved. It is not necessary to rely upon any provision of the contract of carriage.

In La Casse v. Engineering Works (242 Mich. 454) the court said:

"3. If an injury occurs on navigable waters and *in the performance of a maritime contract, it is certainly* within the exclusive jurisdiction of admiralty unless

"(a) the contract is of merely local concern, and

"(b) its performance has no direct effect upon navigation or commerce, and

"(c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.'

"4. State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters when, and only when, the service is within the exceptions (a), (b) and (c) above.

"5. If, however, the injury occurs on navigable waters, but *in the performance* of a non-maritime contract, it is, at least *prima facie* local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

This court, in Matter of Doey v. Howland Co. (supra, p. 35), a proceeding under the Workmen's Compensation Law, where an employee of a company was killed while making repairs to a ship of which it was not the owner, said: "Was Doey, at the time of his death, engaged in the performance of a maritime contract * * *. In determining whether a contract be of a maritime nature, locality [fol. 81] is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done."

While the injury to the claimant Heaney occurred on navigable water, he was not at the time engaged in the performance of a maritime contract. He was engaged in the performance of a contract non-maritime in its nature and the recovery sought is "a part of the compensation agreed to be paid for the services rendered in the course of the employment."

If the action were for wages due under the contract of employment, the Federal court would not have jurisdiction. Jurisdiction is not conferred upon that court because another part of the agreed compensation is sought to be recovered or because there chances to be an independent contract for passage with a third party or a tort liability on the part of the third party.

With this view of the applicable rule we may consider the cases which might appear to establish a contrary rule.

The first of these is Spencer Kellogg & Sons, Inc., v. Hicks (285 U. S. 502, 512, 514). The workmen, employees of Kellogg & Sons, in the manufacture of linseed oil at Edgewater, New Jersey, lived in New York. In order to ferry them to and from the factory, the company owned and operated the Linseed King, a gasoline launch. Those killed and injured were of three classes, regular employees of Kellogg & Son in the Edgewater plant, men who had applied for work in discharging the cargo of a ship the preceding day but who had been advised to report again on the morning of the accident, and men seeking employment in answer to an advertisement. The court there held the compensation statute of the State of New Jersey inapplicable on the ground that it was incapable of enforcement by the ordinary process of any court and "is not saved to suitors from the grant of exclusive jurisdiction to the Courts of the United States of all civil cases of admiralty and maritime jurisdiction." The court said: "Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. The injury to the passengers resulted from negligence of the company's agent in the navigation of the launch. It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty * * *."

The court further said: "Kellogg & Sons sustained toward employees injured or killed the dual relationship of a carrier by water and a general employer at its Edgewater plant."

[fol. 82] In that case the employer was the owner of the boat, undertook the interstate carriage of passengers by

water on a launch operated by its servants, sustained a dual relationship to its employees of a carrier by water and a general employer, and was guilty of a maritime tort. None of these things are present in the instant case. Here, since the employer was not a carrier of passengers by water, it was not guilty of a maritime tort and the proceeding is not one to "impose liability for such a tort" as the proceeding in the Kellogg case was held to be.

In Knickerbocker Ice Co. v. Stewart (253 U. S. 149) the employee for whose death compensation was asked was employed as a barge man and was doing work of a maritime nature. There the very fact that the employee was employed as a barge man and that it was found that he was doing work of a maritime nature distinguishes that case from the one at bar.

In Southern Pacific Co. v. Jensen (244 U. S. 205) the deceased employee was engaged in driving a small electric freight truck into the steamship El Oriente where it was loaded with cargo, then driving the truck out of the vessel upon a gangway, connecting the vessel with pier 49, North river, and thence upon the pier where the lumber was unloaded from the truck. He jammed his head between the lumber and the ship, thereby breaking his neck. Compensation was awarded under the New York State statute. The court said that the work of a stevedore in which the deceased was engaged was maritime in its nature, his employment was a maritime contract and that the injuries which he received were likewise maritime. This statement of the holding of the court makes it evident that the employee there was engaged in maritime work and that the case is not authority for holding claimant in this case not entitled to compensation.

The fact that by section 29 of the Workmen's Compensation Law the claim of an employee against a third party for tort is assigned to the carrier paying an award or the further fact that the same statute provides for assignment of a cause of action based upon a payment into the State fund in a case where a person is killed through negligence does not bar this proceeding. The right to compensation is not dependent upon the existence of a claim or cause of action against a third party. No liability on the part of the third party is created by the statute. The effect of the statute is not to guarantee collection of damages as a result

of the assignment. The assigned cause may be valueless as a result of contributory negligence on the part of the injured employee (Liberty Mutual Ins. Co. v. Colon & Co., 260 N. Y. [fol. 83] 305), inability of the assignee to establish negligence on the part of the third person (Liberty Mutual Ins. Co. v. Colon & Co., supra), financial irresponsibility of the third person, or that conduct tortuous under the law of the forum where the compensation contract is enforceable is not tortuous under the law of the forum where the accident occurred. (Travelers Ins. Co. v. Central R. R. Co. of N. J., 143 Misc. Rep. 589.)

Why should it be held that the contract right is rendered unenforceable as between the parties thereto for the reason that there exists incapacity on the part of the assignee of the cause of action, based upon the possible tort liability of a third person to maintain an action thereon? To do so would defeat the main purpose of the compensation contract of which the provision for assignment is a mere incident. Regardless of the enforceability of the assigned cause, the employee parts with a valuable right. That it may prove of no value in the hands of the assignee is a matter over which the injured employee has no control.

The order should be affirmed, with costs.

A question under the Federal Constitution was presented and necessarily passed upon by this court. It relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the Workmen's Compensation Law of the State applied, and that the Federal courts had not exclusive jurisdiction to afford relief.

Dissenting Opinion

Crane, Ch. J. (dissenting):

In September of 1932 the P. J. Carlin Construction Company, of 405 Madison avenue, New York city, had a contract with the city of New York for the construction work on Riker's Island, State of New York. The island is owned by the city of New York and used for a penal institution—a penitentiary—and the building operations consisted of the erecting and equipping another penitentiary building and a power house. The island was a mile or two from the

shore, the municipality running a ferry which was used almost entirely for transporting prisoners. It was necessary for the Carlin Company to provide transportation facilities for its workmen, as its contract contained this provision: "Each Contractor shall investigate the existing means of transportation to and from Rikers Island. The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract."

[fol. 84] The Carlin Company made arrangements with one George I. Forsythe, the owner of a steamboat, for this transportation. The steamer was called the Observation and was capable of carrying two hundred and fifty passengers. It was not used exclusively for Carlin's men. Carlin's arrangement with Forsythe was embodied in a letter, June 26, 1931, and orally accepted by Captain Forsythe. In part it reads as follows: "You are to operate the Steamer 'Observation,' which is warranted by you to be officially rated at 250 capacity by local steamboat inspectors, Custom House, N. Y., full crewed, full covered with adequate public liability and workmen's compensation insurance, upon a schedule furnished to you by our Field Office, and calling for operation five days in the week only, from Monday to Friday inclusive.

"You are to be compensated therefor by collecting fares from the men at the rate of 10c a round trip. In the event that your fares do not reach the sum of $60.00 upon any given day, we shall reimburse you for the difference. * * *

"We understand that your boat is warranted to be in first class condition, with all necessary permits to operate in this service."

The claimant Edward Heaney, who resided in the city of New York, was one of Carlin's workmen, and on the 9th day of September, 1932, boarded the steamboat Observation at One Hundred and Thirty-sixth street for the purpose of going to work on Riker's Island. While the steamboat was in operation and en route to the island, there was a terrific explosion—it was blown to bits, many passengers losing their lives, and this claimant, with others, being injured.

An award has been made to Heaney under the Workmen's Compensation Law of this State which has been unanimously affirmed by the Appellate Division, an appeal being

allowed by this court. The Commission made this finding: "At the time Edward Heaney sustained the accidental injuries herein above referred to, the status of the claimant and the employer herein was a matter of local concern, was subject to the regulation of the State and in no way worked prejudice to any characteristic feature of the General Maritime Law." Although this is stated as a finding of fact it is a conclusion of law drawn from the facts, with which we cannot agree.

That the explosion of a passenger steamer while in operation upon the seas, or, to be more exact, the East river as it opens into Long Island sound, was a maritime matter or maritime tort is self evident. That Heaney would have an action in admiralty against the steamer for any negligence [fol. 85] causing the explosion or for any unseaworthiness must be admitted. Such action would also lie in admiralty or at common law against the owner. Although most of the cases in the books deal with sailors or workmen on ships, maritime law applies as well to passengers. (Benedict on Admiralty [5th ed.], pp. 99, 100; The Moses Taylor, 71 U. S. [4 Wall.] 411; Chicago D. & G. B. Transit Co. v. Moore, 259 Fed. Rep. 490; certiorari denied, 251 U. S. 553.) To determine, therefore, whether the explosion of a passenger steamer at sea is a matter of local concern so that the application of our Workmen's Compensation Law will not prejudice the characteristic features of the maritime law or its uniformity of application, we must start with this conceded fact: that Heaney was injured in a maritime tort and, if there be negligence, has a cause of action against the ship or the owner in admiralty. In other words, if there be any wrong or any cause of action, admiralty has jurisdiction of it, preserving to the States any common law remedy, which of course does not include the Workmen's Compensation Law. (Southern Pacific Co. v. Jensen, 244 U. S. 205; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.)

What is the effect of our Workmen's Compensation Law upon the remedy in admiralty? By section 29 of our Workmen's Compensation Law when the employee accepts compensation his cause of action is assigned to the insurance carrier. This is a modification of all rights existing at common law. No tort action could be assigned. But we go further, for the cause of action which passes to the insurance company is prosecuted not on the basis of subrogation

solely, but for the benefit of the insurance carrier. (Tracy v. American Mutual Liability Ins. Co., 266 N. Y. 536, decided January 24, 1935; cf. Zurich G. A. & L. Ins. Co. v. Childs Co., 253 N. Y. 324, 329; Travelers Ins. Co. v. Brass Goods Mfg. Co., 239 N. Y. 273.)

A new cause of action is also created by the New York statute which never before existed either at common law or in admiralty. By section 15 it is provided that the insurance carrier shall pay the sum of one thousand dollars into certain special funds in every case in which the person killed through negligence shall have left no person entitled to compensation. For this amount thus paid the insurance carrier is given a cause of action against the negligent third party. We held in Phanix Ind. Co. v. Staten Island R. T. Ry. Co. (251 N. Y. 127) that the same result followed when the widow or next of kin settled with the third party for more than would have been paid under the Workmen's [fol. 86] Compensation Law. In such a case the insurance carrier may recover from the third party an additional one thousand dollars which he has been obliged to pay into the State treasury.

Admiralty recognizes no such causes of action. They are peculiar to New York State and may vary with the enactments of every State Legislature. True, these provisions are not applicable here for the reason that Heaney is alive, not dead, but we are dealing with the application or the possible application of the Workmen's Compensation Law to an admiralty tort wherein a passenger on a steamer has been injured or killed. The very nature of the remedy provided by this State legislation shows on its face that it seeks to supplement or add to the admiralty law when a cause of action assigned to an insurance carrier is attempted to be prosecuted in admiralty. In Travelers' Ins. Co. v. Prince Line, Ltd. (262 Fed. Rep. 841), a District Court decision, Mayer, J., held that admiralty would not recognize the assignability of a tort action, and that our Workmen's Compensation Law did not apply to admiralty torts. In Knickerbocker Ice Co. v. Stewart (253 U. S. 149) it was held that the provisions of section 9 of the Judiciary Act of 1789 granting to the United States District Courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, referred to remedies for the en-

forcement of the Federal maritime law. It conferred no substantive rights and did not authorize the States so to do. Our Workmen's Compensation Law does confer substantive rights. It gives to the insurance carrier a right to recover full damages when it has only paid out part, and also to recover on an entirely new cause of action for moneys contributed to State funds.

Whether Heaney has a cause of action for negligence in admiralty is beside the point. This all depends upon evidence as to the nature of the explosion. The fact remains that the explosion on this ship at sea was a matter of maritime jurisdiction, the common law remedies being preserved. Heaney has no claim, therefore, under the Workmen's Compensation Law of the State.

The United States Supreme Court, in Spencer Kellogg & Sons, Inc. v. Hicks (285 U. S. 502), had a case similar in facts and in my judgment exactly the same in principle. In that case the employer chartered the ship and it was held that his workmen, while being transported on navigable waters, should receive an award in admiralty but no award under the State compensation law. Like Heaney here, these employees were passengers. The fact that the employer in that case was the charterer or owner of the boat, [fol. 87] became important and was emphasized by reason of an application made by it to limit liability to the value of the boat as permitted under Federal statute. It had nothing to do with shifting or changing the principle that passengers being transported at sea or on navigable waters by a steamer are subject to admiralty jurisdiction. The court said: "Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. The injury to the passengers resulted from negligence of the company's agents in the navigation of the launch. It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty within the meaning of Article III, Sec. 2 of the Constitution, triable in the United States courts sitting in admiralty" (p. 512).

If the rights and obligations of Heaney and Forsythe, the owner of the Observation which blew up, depend upon

and arise out of the maritime law, what becomes of those provisions of our State law which assign Heaney's cause of action to an insurance carrier and may in a proper case give the insurance carrier a claim against Forsythe for a thousand dollars contribution to a State fund? Heaney's remedy is solely in admiralty or at common law as our Workmen's Compensation Law does not apply to this unfortunate occurrence.

The authorities relied upon by the respondents, such as Millers' Ind. Underwriters v. Braud (270 U. S. 59); Sultan Ry. & T. Co. v. Dept. of Labor & Industries (277 U. S. 135), and State Industrial Board v. Terry & Tench Co., Inc. (273 U. S. 639 [240 N. Y. 292]), are not applicable as the work out of which the injury grew in those cases was so closely identified with the land that it had very little to do with transportation on navigable waters or with the safety or operation of ships. Admiralty, on the other hand, has always been solicitous of the seaworthiness and proper equipment of passenger craft both in behalf of passenger and seaman.

Since writing the above there has come to my attention the case of Kenward v. The "Admiral Peoples," (296 U. S. ——), decided June 3, 1935, by the United States Supreme Court, in which the Chief Justice wrote the opinion. A passenger on a steamboat while disembarking at Portland was injured by falling from a gangplank leading from the [fol. 88] vessel to the dock. The vessel was liable, and the question of jurisdiction arose. The Chief Justice said: "This is one of the border cases involving the close distinctions which from time to time are necessary in applying the principles governing the admiralty jurisdiction. That jurisdiction in cases of tort depends upon the locality of the injury. It does not extend to injuries caused by a vessel to persons or property on the land. Where the cause of action arises upon the land, the state law is applicable" (citing cases).

"The basic fact in the instant case is that the gangplank was a part of the vessel. It was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore."

The order of the Appellate Division and that of the Industrial Board should be reversed and the claim dismissed, with costs in all courts.

Crough, Loughran and Finch, JJ., concur with Hubbs, J.; Crane, Ch. J., dissents in opinion in which O'Brien, J., concurs, and Lehman, J., dissents also.

Order affirmed.

[fol. 89] Clerk's certificate to transcript omitted in printing.

[fol. 90] Citation, in usual form, omitted in printing.

[fol. 91] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioners, The Travelers Insurance Company, and P. J. Carlin Construction Co., respectfully show:

Your petitioners are the appellants in the above entitled cause.

On September 9, 1932, the appellee Edward Heaney, sustained personal injuries by reason of an explosion which caused the sinking of the steamboat "Observation", on which the said appellee Heaney was a passenger, while the said boat was afloat and under propulsion in navigable waters in New York Harbor.

Thereafter, and on or about the 9th day of October, 1932, the appellee Edward Heaney, presented to and filed with the State Industrial Board of the State of New York his claim for compensation under the Workmen's Compensa-
[fol. 92] tion Law of the State of New York, alleging that your petitioner, the P. J. Carlin Construction Co., was his employer at the time of the said accident. At the time of the alleged accident, your petitioner, The Travelers Insurance Company, was the insurance carrier for the said P. J. Carlin Construction Co., and, as such, insured the payment of compensation to its employees under the provisions of the Workmen's Compensation Law of the State of New York.

Hearings on the aforesaid claim for compensation were held and testimony taken before a referee of the Industrial Board of the State of New York, and your petitioners there and then contended that the Industrial Board, and the Department of Labor, of which the Industrial Board is a part, were without jurisdiction because the accident occurred on navigable waters of the United States and the claim was, therefore, subject only to the admiralty jurisdiction of the United States.

The referee disallowed the claim upon the ground that the Board had no jurisdiction and on the further ground that the accident did not arise out of and in the course of the said claimant's employment. Upon appeal to the Industrial Board, a member of that Board reversed the decision of the referee, and awarded compensation to the said claimant, and thereafter the Industrial Board made findings in which it was stated that on September 9, 1932, while the said claimant was an employee of P. J. Carlin Construction Company and while he was engaged in the regular course of his employment and while working for his employer, and after boarding the steamboat "Observa-[fol. 93] tion" and while he was standing on the deck of the boat, which boat was in operation and en route to Rikers Island, the boat exploded, causing injury to said claimant. The findings also stated as facts that the said claimant stepped into his employment the moment he stepped aboard the said steamboat, that transportation on that boat was included within and was part of the contract of employment between P. J. Carlin Construction Co., and the said claimant, and was an incident of his employment, and that at the time the claimant sustained his injuries his status and that of the employer were a matter of local concern, subject to the regulation of the state, and in no way worked prejudice to any characteristic feature of the general maritime law. The findings also state specifically that the claim of this claimant is within the jurisdiction of the Industrial Board and not such a matter as is subject to the exclusive jurisdiction of the admiralty law.

An award of compensation under the said Workmen's Compensation Law was made to the said claimant and against both of the petitioners on the 8th day of December, 1933, and on the 26th day of December, 1933, your petitioners appealed from that award to the Appellate Division of the Supreme Court of the State of New York,

Third Department, which court, by a judgment entered on January 21, 1935, unanimously affirmed the said award.

Thereafter, upon application duly made, the Court of Appeals of the State of New York granted leave to appeal to the said court from the said unanimous judgment of affirmance of the Appellate Division, Third Department; and, after argument duly had, the Court of Appeals of the State of New York, on the 19th day of November, 1935, affirmed the said judgment of the said Appellate Division of the Supreme Court, and a judgment of affirmance thereof [fol. 94] was thereupon entered, and by the said judgment of affirmance the record was remitted into the said Appellate Division of the Supreme Court, Third Department, where the said record now remains.

That there is error in the said final judgment and the record of proceedings in the said Court of Appeals of the State of New York, whereby your petitioners are aggrieved. That in this case your petitioners have drawn in question the validity of a statute of the State of New York, namely, the Workmen's Compensation Law of the State of New York, under which the said award and said judgment were made, on the ground that said statute is repugnant to and in contravention of article III, section 2, of the Constitution of the United States, and of the Judicial Code, Section 24, clause 3, and section 256; U. S. C., title 28, sections 41 and 371. And the decision and judgment of the said Court of Appeals is in favor of the validity of the said Workmen's Compensation Law of the State of New York.

The Court of Appeals of the State of New York is the highest court in the said state in which a decision in this cause can be had and its said judgment of affirmance is final.

The Court of Appeals in its decision and in its judgment herein certified as follows:

"A question under the Federal Constitution was presented and necessarily passed upon by this court. It relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East river, New York. This court held that the Workmen's Compensation Law of the state applied, and that the Federal courts had not exclusive jurisdiction to afford relief."

In accordance with section 237 (a) of the Judicial Code, [fol. 95] U. S. C., title 28, section 344, and in accordance

with the Rules of the Supreme Court of the United States, your petitioners respectfully show that the case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was enacted, to wit, under section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioners pray for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court in said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Court of Appeals of the State of New York may be examined and reversed, and also pray that a transcript of the material parts of the record herein and the proceedings and papers in this cause, including the opinions delivered in the case, be made by the clerk of the Appellate Division of the Supreme Court, Third Department, under his hand and the seal of the said court and transmitted to the Supreme Court of the United States, as provided by law; and that an order be made fixing the [fol. 96] security to be required of your petitioners, and that the supersedeas bond tendered by your petitioners be approved, and that the said appeal may operate as a supersedeas.

Assignment of Errors

The said appellants assign the following errors in the record and judgment of the said Court of Appeals of the State of New York, to wit, that the said Court of Appeals of the State of New York erred in the said decision and judgment as follows:

1. In ruling that the subject matter of this case is of local concern and subject to the regulation of the State of New York.

2. In ruling that this case involves a contract matter and that said contract matter is of a non-maritime nature.

3. In ruling that the Workmen's Compensation Law of the State of New York is a valid law, applicable to this case.

4. In failing and refusing to rule that the subject matter of this case is a maritime matter, governed by the principles of the maritime law of the United States.

5. In failing and refusing to rule that courts administering the maritime law of the United States have exclusive jurisdiction to determine the rights and the liabilities of appellee Heaney and the appellants in respect of the subject matter of this case.

6. In failing and refusing to rule that the Workmen's Compensation Law of the State of New York is contrary to Article III, section 2, of the Constitution of the United States and to sections 24 and 256 of the Judicial Code, U. S. C., title 28, sections 41 and 371, in that it assumes to confer upon the appellee State Industrial Board of the State of New York jurisdiction to hear and determine a claim for statutory workmen's compensation in a matter of admiralty and maritime jurisdiction.

7. In giving judgment herein against the appellants and in favor of the appellee Heaney, affirming the award herein [fol. 97] of the appellee State Industrial Board of the State of New York and the judgment herein of the Appellate Division of the Supreme Court of New York, Third Judicial Department, affirming said award.

8. In failing and refusing to give judgment herein in favor of the appellants, on the ground that the said Workmen's Compensation Law of the State of New York is unconstitutional and void in that said statute, in so far as it purports to fix, determine and regulate the rights of the appellee Heaney against the appellants and the liabilities of the appellants to said appellee Heaney is repugnant to and prohibited by Article III, section 2, of the Constitution of the United States and sections 24 and 256 of the Judicial Code, U. S. C., title 28, sections 41 and 371.

PRAYER FOR REVERSAL

For which errors the appellants, P. J. Carlin Construction Co., and The Travelers Insurance Company, pray that the said judgment of the Court of Appeals of the State of New York, dated November 19, 1935, in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a judgment rendered in favor of the appellants, and for costs.

Elmer Clyde Sherwood, Counsel for Appellants.

[fol. 98] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

On reading and filing the petition of P. J. Carlin Construction Co. and The Travelers Insurance Company, corporations, the appellants herein, praying for the issuance of an order herein allowing their appeal to the Supreme Court of the United States from the Court of Appeals of the State of New York, and it appearing from the said petition and the record of the above entitled cause, that there was drawn in question the validity of the award of the State Industrial Board of the State of New York on the ground that the said award and the statute of the State of New York on which the award is based are repugnant to the Constitution of the United States, and that the decision of the said Court of Appeals was in favor of the validity of such award and statute, and that such petition is a proper petition for the issuance of this order,

Now, therefore, it is ordered by the undersigned, the Chief Judge of the Court of Appeals of the State of New York, that said appeal be and same is hereby allowed; and

The said appellants, P. J. Carlin Construction Co., and The Travelers Insurance Company, now presenting a bond [fol. 99] in the sum of one thousand dollars, executed by said P. J. Carlin Construction Co. and The Travelers Insurance Company, as principals, and American Surety Company of New York, as surety, it is ordered that such

bond be and the same is hereby approved and received as the proper security on this appeal, and filed in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department.

It is further ordered that the appeal herein shall operate as a supersedeas.

It is further ordered that the Clerk of the Appellate Division of the Supreme Court, Third Department, within forty days from this date, make and transmit to the Clerk of the Supreme Court of the United States under his hand and the seal of said court, a transcript containing a true copy of all material parts of the record herein which shall be designated by præcipe filed with him by any of the parties hereto.

Dated this 15 day of February, 1936.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 100] IN SUPREME COURT OF THE UNITED STATES

Statements of Points to be Relied upon and Designation as to Printing Record—Filed March 11, 1936

APPELLANTS' POINTS

I

The entire subject of legal liability arising out of bodily injury suffered by a passenger in a shipwreck occurring in transportation over navigable waters of the United States is a maritime matter falling within the exclusive jurisdiction of the United States, by virtue of the provisions of Article III, Section 2, and of Article I, Section 8, of the Constitution of the United States.

II

Heaney's injury was maritime. It bears the closest relation possible to navigation and commerce, since it not only occurred in the actual course of navigation but arose directly out of the very fact and act of navigation.

III

It is not essential to the application of the maritime law that the matter involved relate to interstate or foreign

commerce. Federal jurisdiction over the latter is conferred by a separate, distinct and independent grant in the Constitution.

[fol. 101] IV

The absence of any wrongful act or neglect on the part of the appellant Carlin Company which would make it liable to Heaney under any known principle of the maritime law does not deprive the admiralty courts of their jurisdiction.

V

The subject matter of this case is not of purely local concern nor is it within the jurisdiction of the State of New York.

VI

This proceeding to recover compensation under the provisions of the New York Workmen's Compensation Law is not a common law remedy saved to suitors by Section 256 of the Judicial Code; U. S. C., Title 28, Section 371.

VII

The provision of the New York Workmen's Compensation Law making it the exclusive source and measure of the employer's liability is an essential part of it; so that the whole statute is invalid and inapplicable as to a maritime injury, since this essential provision is beyond the power and jurisdiction of the State to make or to enforce.

VIII

The New York Workmen's Compensation Law, as applied to a maritime injury, is invalid in that it purports and attempts to work an assignment or transfer of the employee's cause of action against a negligent third person—a provision that is beyond the power of the State to make or to enforce; and in that it purports and attempts to impose upon a negligent third person, under certain circumstances, an added liability of a nature wholly foreign to and incompatible with the maritime law.

[fol. 102] IX

The judgment appealed from should be reversed, with costs, and the cause remanded, with instructions that

Heaney's claim under the New York Workmen's Compensation Law be dismissed.

The above are the points on which the appellants intend to rely.

The parts of the record which the appellants think necessary for the consideration thereof are the entire record made herein and transmitted to this court by the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Department, under his hand and the seal of the said court.

Elmer Clyde Sherwood, Counsel for the Appellants, Address: 100 East 42nd Street, New York City.

Service acknowledged this 6th day of March, 1936.

Slavin & Leichtman, Counsel for Appellee Edward Heaney, Address: 11 West 42nd Street, New York City. John J. Bennett, Jr., Attorney General, Counsel for State Industrial Board of the State of New York, by Joseph A. McLaughlin, Assistant Attorney General in Charge, Address: 80 Centre Street, New York City.

[fol. 102½] [File endorsement omitted.]

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 6, 1936

Appeal from the Supreme Court of the State of New York

Treating the appeal papers herein from the Supreme Court of the State of New York as an application for a writ of certiorari,

On consideration whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

Endorsed on cover: File No. 40,371. New York Supreme Court. Term No. 817. P. J. Carlin Construction Co., and The Travelers Insurance Company, petitioners, vs. Edward Heaney and State Industrial Board of the State of New York. Filed March 11, 1936. Term No. 817, O. T., 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 817

P. J. CARLIN CONSTRUCTION CO. AND THE TRAVELERS INSURANCE COMPANY,

Appellants,

vs.

EDWARD HEANEY AND STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Appellees.

APPELLANTS' STATEMENT AS TO JURISDICTION.

A.

The Statutory Provisions Believed to Sustain the Jurisdiction.

Judicial Code, section 237 (a); U. S. C., title 28, sections 344 and 861 a.

In this cause is drawn in question the validity of a statute of the State of New York which has been held by the court below valid and applicable in a maritime matter.

The appellants' contention herein has been and is that said statute of New York, so applied, is repugnant to the Constitution and Laws of the United States.

B.

The Statute of the State, the Validity of Which is Involved—New York Workmen's Compensation Law.

Chapter 67 of the Consolidated Laws of the State of New York was enacted as chapter 816 of the Laws of 1913 (volume 4, page 2277, *et seq.*) and was re-enacted by chapter 41 of the Laws of 1914 (volume 1, page 216, *et seq.*). Subsequently, after various amendments, the statute, together with all amendments was embodied in chapter 615 of the Laws of 1922 (page 1623, *et seq.*). (The volumes and pages of subsequent amendments, which consist of matters of detail, are enumerated at the end of this statement.)

Since this Court is believed to be familiar with the general plan and scope of this statute and with its essential features, a summary statement of its pertinent provisions is deferred to the latter part of this statement.

In this case and on this appeal, the appellants have questioned and are questioning the validity of the statute above referred to on the ground that it is repugnant to Article III, Section 2, of the Constitution of the United States and to Section 24, Clause 3 and to Section 256 of the Judicial Code; U. S. C., Title 28, Sections 41 and 371.

C.

Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Appeal.

The date of the judgment of the Court of Appeals of the State of New York, sought to be reviewed, is November 19, 1935.

The date upon which the application for appeal is presented is February 14, 1936.

D.

Nature of the Case.

Upon a claim presented to it by the appellee Heaney, the appellee State Industrial Board of the State of New York made an award of compensation under the said Workmen's Compensation Law of the State of New York to said Heaney for accidental personal injuries suffered by him which the said Industrial Board found arose out of and occurred in the course of said Heaney's employment. The award was made against the appellant P. J. Carlin Construction Company and the appellant Travelers Insurance Company, its compensation insurance carrier.

The appellee Heaney suffered bodily injury from the destruction and sinking of the steamboat "Observation," a major disaster which occurred in the East River, New York Harbor, on September 9, 1932. He was at the time a passenger on the vessel, having taken passage from East 136th Street, Manhattan, to Rikers Island, lying in New York Harbor. He paid a fare of ten cents for the round trip.

At the time of the occurrence, the boat had left the dock at 136th Street on a voyage to Rikers Island, which was distant from one to two miles from the point of departure. The accident occurred in the East River, in navigable waters of the United States.

The cause of the disaster is not disclosed in the record, other than the fact that there was a violent explosion in or near the vessel. Many persons on board lost their lives and many others were injured, including the appellee Heaney.

Mr. Heaney lived in the Bronx, New York City. He was a bricklayer, who had worked for the appellant P. J. Carlin Construction Company on construction work on

Rikers Island. When injured, he was journeying from his home to Rikers Island to do work there for the appellant Carlin Company. His wages were calculated upon an hourly basis. The time for which he was paid began after he reached the island and ended before he left it.

The appellant Carlin Company was one of a number of contractors engaged in the work of constructing buildings on Rikers Island for the City of New York. On the vessel at the time of the catastrophe were a large number of workmen who were on their way to Rikers Island, there to do work for the various contractors.

The steamboat "Observation" was being operated in a ferry service which was maintained primarily for the purpose of affording workmen wishing to go to Rikers Island to engage in this construction work a means by which they could secure passage to the island. It was a "large" steamboat, capable of carrying 250 passengers.

Rikers Island, the property of the City of New York, was used by it exclusively as a place of confinement of criminal prisoners. While the city maintained a ferry service from Manhattan to the island for its own purposes, it did not undertake in its contracts with the various contractors to provide "regular ferry service" for the transportation from main land to island of men and materials for the construction work there to be done; but there was inserted in each of the various contracts which it had made a provision whereby it was pointed out that the subject of such transportation was the concern of the other contracting party.

For a time the workmen used the municipal ferry in going to Rikers Island. When, after a time, the city declined to permit the further regular use of its ferry for this purpose, the appellant Carlin Company made an arrangement with one George I. Forsyth, whereby it gave its license or

consent that Forsyth operate a ferry service to Rikers Island upon schedules to be indicated by it, and whereby it assured him that the receipts by him of fares from his passengers of ten cents a round trip would equal $60.00 a day, and promised to pay him any deficit or difference between said amount and the daily fares received by Forsyth from the passengers. Forsyth manned and operated the vessel and paid the crew. He received the fares that the men paid for their transportation. At stated intervals Forsyth collected from the appellant Carlin Company the amount of the difference between the fares he had received and the sum above indicated.

The vessel was operated by Forsyth in this ferry service five days a week—Monday to Friday inclusive—during certain hours of the day. On other days, and upon occasions at night, the vessel was operated by Forsyth in special excursions, with which the appellant Carlin Company had no concern.

The steamboat "Observation" was not owned, operated or controlled by the appellant Carlin Company.

E.

Ruling Below.

The judgment of the Court of Appeals hereinabove referred to and here sought to be reviewed affirmed an award of the appellee, State Industrial Board of the State of New York and affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, wherein and whereby said award had been affirmed by said Appellate Division. Said award and said judgment granted unto the appellee Edward Heaney a recovery of money against the appellants as statutory compensation on account of the bodily injuries and dam-

ages suffered by said appellee Heaney as hereinbefore set forth.

The said judgment finally adjudges the liability of the appellants to pay to the appellee Heaney the sum directed in and by the said award to be paid to him.

On the hearings had herein before the appellee State Industrial Board of the State of New York of the claim filed by appellee Heaney for statutory compensation, the appellants objected to the jurisdiction on the ground that the subject matter of the claim, an accident and injury occurring on navigable waters of the United States, is a maritime matter within the exclusive admiralty jurisdiction of the United States.

The said appellee Industrial Board made a finding that it had jurisdiction and granted an award of compensation to the appellee Heaney against the appellants.

Upon appeal by these appellants from said award to the Appellate Division of the Supreme Court of New York, Third Judicial Department, as provided by law, judgment was rendered against the appellants, affirming said award.

Thereafter, upon appeal to the Court of Appeals of the State of New York from said judgment, pursuant to permission duly granted to the appellants by the said Court of Appeals, the latter court affirmed the said judgment.

In both said courts, the appellants contended upon said appeals that the subject matter of the case is maritime and is within the exclusive admiralty jurisdiction of the United States, by virtue of Article III, Section 2 of the Constitution of the United States and of Section 24, clause 3 and of Section 256 of the United States Judicial Code; U. S. C., title 28, Sections 41 and 371.

In the said decision and judgment of the Court of Appeals, here sought to be reviewed, that court certifies:

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. It

relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the Workmen's Compensation Law of the State applied, and that the Federal courts had not exclusive jurisdiction to afford relief."

F.

Cases Believed to Sustain the Jurisdiction.

The appellants believe that the following cases sustain the jurisdiction of this Court in this matter:

Sultan Railway & Timber Co. v. *Department of Labor, etc.*, 277 U. S. 135;
King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
Spencer Kellogg & Sons, Inc. v. *Hicks*, 285 U. S. 502;
The Moses Taylor v. *Hammons*, 71 U. S. (4 Wall.) 411;
Baizley Iron Works v. *Span*, 281 U. S. 222;
T. Smith & Son v. *Taylor*, 276 U. S. 179.

G.

The Workmen's Compensation Law of the State of New York as it existed at the time of the accident involved in this case, and of the hearings held and award made herein, established nineteen groups of hazardous employments; defined "employee" as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, or one who is in the service of an employer whose principal business is that of carrying on or conducting one of those hazardous employments, but excluding farm laborers and domestic servants; defined "employment" as including employment

only in a trade, business or occupation carried on by the employer for pecuniary gain, with exceptions not applicable to this case; defined "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment and such disease or infection as naturally and unavoidably may result therefrom; and required every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from the intoxication of the injured employee while on duty, in which case neither the injured employee nor any dependent shall receive compensation.

By Section 11 the prescribed liability is made exclusive and in place of any other liability whatsoever, except that, if an employer fails to secure the payment of compensation as provided in Section 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages; and it is provided that in such an action it shall not be necessary to plead or prove freedom from contributory negligence, and that the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to contributory negligence.

Compensation under the said statute is not regulated by the measure of damages applied in suits at law for damages; but, in addition to providing medical, surgical, or other like treatment, it is based on loss of earning power, being graduated according to the average weekly wages of

the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding $200.00, payments to surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached.

The statute contains provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release or commutation of claims for compensation or benefit except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefit shall be paid only to employees or their dependents.

Provision is made for the establishment of a State Industrial Board with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested.

The award or decision of the Industrial Board is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil action.

A fund is created, known as "The State Insurance Fund," for the purpose of insuring employers against liability under the law, and assuring to the persons entitled thereto the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the designated state authority, in view of the hazards of the different classes of employment; and the premiums are to be based upon the total payroll and num-

ber of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund.

By Section 50 each employer is required to insure compensation to his employees in one of the following ways:

> (1) By insuring and keeping insured the payment of such compensation in the State Fund; or
>
> (2) Through any stock corporation or mutual association authorized to transact the business of Workmen's Compensation Insurance in the State; or
>
> (3) By furnishing satisfactory proof to the commissioner of his financial ability to pay such compensation for himself, in which case the commissioner shall require the deposit with the commissioner of such securities as the commissioner may deem necessary of the kind prescribed in certain designated provisions of the Banking Law, to secure his liability to pay the compensation provided in the compensation law.

If an employer fails to comply with this section he is guilty of a misdemeanor and is made subject to a fine or imprisonment, or both; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by Section 11.

Section 29 provides that if an employee entitled to compensation be injured or killed by the negligence or wrong of another not in the same employ, he or his dependents shall elect whether to take compensation under the Workmen's Compensation Law or to pursue his remedy against such other; and that if he elects to take compensation, the awarding of compensation shall operate as an assignment of the cause of action against such other to the person or

insurance carrier liable for the payment of such compensation; and that if he shall elect to proceed against such other, the person liable for the payment of compensation shall contribute only the deficiency between the amount collected from such other and the compensation provided by this statute.

Subdivisions 8 and 9 of section 15 require the payment of $1,000.00 into a special fund in every case where an employee is killed by accident that would have entitled his dependents to compensation, but in which there are no living dependents entitled to such compensation, the funds thus set apart to be applied (1) to increase the compensation otherwise payable to one who loses a second member after he had already been deprived of a member, and (2) to facilitate the rehabilitation of injured employees. Section 29 provides that the payment of such an award shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment, together with the reasonable funeral expenses and the expense of medical treatment, which shall be in addition to any cause of action by the legal representatives of the deceased, in any case where the employee was killed by the negligence or wrong of another not in the same employ.

H.

Where the Statute May be Found in the Official Edition.

The Workmen's Compensation Law of the State of New York was originally enacted as Chapter 816 of the Laws of 1913, and was re-enacted by Chapter 41 of the Laws of 1914. Thereafter, by Chapter 615 of the Laws of 1922, all prior amendments to the statute thus originally enacted and re-enacted were embodied in the Workmen's Compensation Law and it was in many respects rewritten. Subsequent to

Chapter 615 of the Laws of 1922, and prior to the accident upon which the claim herein is based, the said statute was amended by many statutes to which we refer below.

Chapter 816 of the Laws of 1913 is printed on pages 2277 to 2312 of the Official Edition of the statutes of New York, known as Laws of New York, Extraordinary Session, 1913. Chapter 41 of the Laws of 1914 appears on pages 216 to 251 of the Official Edition of the Laws of New York, 1914, Vol. 1, and Chapter 615 of the Laws of 1922 appears on pages 1623 to 1662, inclusive, of the Official Edition of the Laws of New York for 1922.

The amendments subsequent to 1922 and prior to September 9, 1932, the date when the appellee Heaney was injured, were made by various statutes bearing the chapter numbers appearing in the first column below, were enacted in the year appearing in the second column below and are published on the pages appearing in the third column below, of the Official Edition of the Laws of New York for the year indicated in the second column.

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46, 334, 566, 567, 568, 571, 572	1923	46-47, 573-574, 861-862, 863, 870, 871
317, 318, 319, 320, 499, 500, 658	1924	586, 587, 588, 917-918, 919, 1210
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200, 201, 202, 203, 248, 488	1932	564, 565, 566-568, 568, 632, 1062-1063

ELMER CLYDE SHERWOOD,
Counsel for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. [redacted] 9

P. J. CARLIN CONSTRUCTION CO. and THE TRAVELERS INSURANCE COMPANY,

Appellants,

against

EDWARD HEANEY and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Appellees.

APPELLANTS' BRIEF AS TO JURISDICTION.

ELMER CLYDE SHERWOOD,
WILLIAM B. DAVIS,
Counsel for the appellants.

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The opinions delivered in the court below are officially reported as *Matter of Heaney* v. *Carlin Construction Co., et al.*, in 269 N. Y. 93.

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 817.

P. J. CARLIN CONSTRUCTION CO. and THE TRAVELERS INSURANCE COMPANY,

Appellants,

against

EDWARD HEANEY and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Appellees.

APPELLANTS' BRIEF AS TO JURISDICTION.

While neither of the appellees has made a formal motion either to dismiss or affirm, the appellee State Industrial Board of the State of New York has served and filed a statement opposing jurisdiction, in which the points are made that the matter sought to be reviewed is one of local concern, that no substantial Federal question is presented, and further that the validity of the state statute here involved, as applied in this case, is established by principles expressed by this court in cases therein enumerated; and asking that this court "refuse to assume jurisdiction to review the judgment and decree appealed from".

This brief, interposed by the appellants with the purpose of indicating briefly to the court that the case is not one that should be disposed of, without argument and adequate brief, upon the respective statements of the appellants and

the appellee State Industrial Board, will be confined to a summary discussion of the said appellee's suggestions above indicated.

1. As to appellee's contention that "the matter sought to be reviewed is one of local concern": In no case cited and in no case with which counsel for the appellants are familiar has this court so held, where, as here, the claimant was injured in the course of transportation as a passenger upon a vessel.

As pointed out in the appellants' statement as to jurisdiction, the appellee Heaney's injuries were the direct result of the destruction and sinking of the vessel in the course of a voyage in which he was being transported across the East River. Transportation by water is the principal subject of admiralty and maritime jurisdiction. The injuries which are the subject matter of this case arose directly out of such transportation.

The learned court below was closely divided, four of the judges voting for affirmance, while three dissented. Two opinions were written, one representing the views of the majority, the other those of the three dissenting members of the court. These opinions, which have been made a part of the record filed herein, are officially reported in 269 N. Y. 93.

In *Spencer Kellogg & Sons, Inc.*, v. *Hicks*, 285 U. S. 502, this court held that the workmen's compensation law of New Jersey was inapplicable and that the case was controlled by the principles of the maritime law. In the case at bar, three of the members of the court below considered that decision controlling, Chief Judge Crane saying for the minority that it was similar in facts and in his judgment exactly the same in principle.

In that case, as here, employees on their way from their homes to their place of work were being transported by vessel over navigable waters of the United States, the injury directly resulting from the sinking of the vessel in the course

of the voyage. The principal difference in the facts between that case and the present one is that there the employer owned and operated the vessel and was guilty of actionable wrong or neglect whereby liability was imposed upon it under the principles of the maritime law; whereas here the vessel was not owned or operated by the employer, the latter having merely arranged with the owner and operator of the vessel to institute and maintain a ferry service, which was primarily for the purpose of making available to the workmen wishing to engage in the construction work on Rikers Island a means of securing transportation to the island from their homes on the mainland. By the terms of this arrangement the employer assured to the carrier that his receipts from fares from the passengers transported would equal a certain minimum sum per day, agreeing that if such fares were less than the stipulated sum, the employer would pay him the difference.

The appellants will contend upon the appeal that the *Spencer Kellogg* decision of this court is controlling here; that it matters not that here the employer was not the owner and operator of the vessel or the carrier of the workmen. And the appellants will contend further that the absence of actionable wrong on the part of the employer which would give an injured employee a cause of action against the employer for damages under the maritime law is not determinative of the questions here involved; that the right of the employer to immunity under the principles of the maritime law is a valuable right which courts of admiralty will recognize and enforce, and which the state is bound to recognize and respect, equally as would be the right of the employee, in a proper case, to recover from his employer damages for the injury sustained.

2. As to the suggestion in the appellee's statement that "no substantial Federal question is presented": First, If a Federal question is in truth presented, assuredly it is a substantial one, since it goes to the foundation of the

judgment appealed from. If resolved against the appellees, the judgment must fall. Second. That a Federal question is here involved is not questioned in the appellee's statement. The court below has certified

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. It relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the workmen's compensation law of the state applied, and that the Federal courts had not exclusive jurisdiction to afford relief."

It is submitted that the existence of a substantial Federal question is apparent from the statement of the nature of the case contained in the appellants' statement as to jurisdiction. The subject of the case being bodily injury suffered by one being transported by vessel, through the sinking of the vessel in the course of the voyage, it is difficult to conceive a subject more clearly and completely falling within admiralty and maritime jurisdiction. And yet the court below has applied to it a local statute which purports and attempts to provide, as a substitute for the rights and remedies of the parties under the maritime law, a rule and measure of liability, as well as a remedy, wholly foreign and repugnant to the rules and principles of the maritime law applicable to such a case.

3. As to the suggestion in the appellee's statement, that "the validity of the state statute as applied in this case is established by principles expressed by this honorable court in cases heretofore decided", it is not thought necessary or appropriate at this time to discuss at length the decisions of this court therein enumerated. In none of them was involved the subject of injuries suffered by a passenger in transportation.

Strangely enough, among the cases cited by the said appellee is *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, a decision which these appellants claim supports their contention here, in that this court there held that the controlling consideration is the place where the injury was suffered and not the nature of the work which the injured employee is engaged to perform. In that case, the employee was engaged in maritime work—the unloading of a vessel—but since the injury occurred on the dock, an extension of the land, this court held the state compensation statute applicable. The appellants will contend upon this appeal that the reasoning of that case, applied here, leads to the reversal of the judgment appealed from.

It is, of course, true that the bricklaying work that Heaney expected to do when he reached Rikers Island was a matter of local concern. That work, considered alone, had no relation to commerce or navigation. (The same was true of the factory work of some of the men injured and killed in the sinking of the boat "Linseed King", which was the subject of the controversy involved in *Spencer Kellogg & Sons, Inc.*, v. *Hicks*, 285 U. S. 502.) But, in the case at bar, against the contention of these appellants before the Industrial Board and in the courts below, it has been found, and now is finally determined and established, that Heaney's employment did not begin or end on Rikers Island; but on the contrary, that it began when he set foot on the vessel. Likewise, it has been finally determined that Heaney's injury not only occurred in the course of his employment but arose out of that employment. All of which of necessity means that Heaney was employed not alone to lay brick on Rikers Island but also to make a voyage by vessel across the East River, thereby incurring the risks incident to and inseparable from an undertaking of that character. And it was precisely from this maritime risk that Heaney's injury arose, which was likewise maritime. So that this portion of Heaney's employment was distinctly and typically maritime in character. The fact that he was on the

boat as a voyager, rather than as a seaman, a longshoreman, or a repairman, does not alter the maritime nature of his undertaking, so far as the making of the voyage is concerned. The fact that his principal work was on land laying brick did not insulate him from the maritime risks and dangers incident to the making of a voyage across the East River—the very risk from which his injury arose and which made that portion of his employment maritime in its nature. If at first sight there appear to be incongruity in the proposition that this part of Heaney's employment was maritime, these appellants are not responsible for the apparent incongruity. The conclusions indicated have been adopted against the consistent and continued resistance of these appellants. Now that they are finally resolved, they are, of course, binding not alone upon the appellants but also upon all the parties. It is in the light of these conclusions, which form the basis of the judgment, that it will be reviewed here.

As already indicated, the appellants will contend upon the appeal that the decisions of this court cited in the appellee's statement are not applicable or controlling here, but rather the following:

Spencer Kellogg & Sons, Inc., v. *Hicks*, 285 U. S. 502;
Kenward v. *The Admiral Peoples*, 295 U. S. 649;
Northern Coal & Dock Co. v. *Strand*, 278 U. S. 142;
Southern P. Co. v. *Jensen*, 244 U. S. 205;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
Minnie v. *Port Huron Terminal Co.*, 295 U. S. 647;
Employers' Liab. Ass. Corp. v. *Cook*, 281 U. S. 233;
Great Lakes Dredge & Dock Co. v. *Kierejewski*, 261 U. S. 479;
Gonsalves v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171;
Baizley Iron Works v. *Span*, 281 U. S. 222;

Nogueira v. *R. R. Co.*, 281 U. S. 128;
Messel v. *Foundation Co.*, 274 U. S. 427;
Robins Dry Dock & Repair Co. v. *Dahl*, 266 U. S. 449;
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372;
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State Industrial Com. v. *Nordenholt Corp.*, 259 U. S. 263;
Leary v. *U. S.*, 81 U. S. 607, 610;
Reed v. *U. S.*, 78 U. S. 591;
The Spokane, 294 Fed. Rep. 242 (cert. denied, 264 U. S. 583).

Respectfully submitted,

ELMER CLYDE SHERWOOD,
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Counsel for the appellants.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 9.

P. J. CARLIN CONSTRUCTION CO. and THE TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

EDWARD HEANEY and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK.

BRIEF FOR THE PETITIONERS.

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Matter of Heaney v. Carlin Construction Co., 269 N. Y. 93.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 9.

P. J. CARLIN CONSTRUCTION CO. and THE TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

EDWARD HEANEY and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK.

BRIEF FOR THE PETITIONERS.

Preliminary Statement.

This is a proceeding by writ of certiorari to review a judgment of the Court of Appeals of New York affirming an award to the respondent Edward Heaney under the New York Workmen's Compensation Law.

The affirmance was by a divided court, Crane, Ch. J., and O'Brien and Lehman, JJ., dissenting. The opinions delivered in the Court of Appeals are officially reported *sub nom. Matter of Heaney* v. *Carlin Construction Co.*, 269 N.

Y. 93. In the Appellate Division of the Supreme Court of New York the case is officially reported under the same title in 243 App. Div. 648. No opinions were written in the Appellate Division.

Writ of certiorari was granted by this court on April 6, 1936, appeal papers having been filed herin on March 11, 1936, which the court treated as an application for a writ of certiorari (R., 75).

Jurisdiction of this court is invoked on the following grounds:

There is drawn in question in this proceeding the validity and the applicability of the New York Workmen's Compensation Law, which has been held in the courts below to be valid and applicable to the claim of the respondent Edward Heaney for compensation for bodily injuries suffered on September 9, 1932, by the destruction and sinking of the steamship "Observation", while he was a passenger on the vessel, which was then being operated in the East River, New York Harbor.

The petitioners believe that the jurisdiction of this court is sustained by the provisions of the Judicial Code, section 237 (a); U. S. C., Title 28, sections 344 and 861 a.

The New York Workmen's Compensation Law, upon which the judgment under review is based, Chapter 67 of the Consolidated Laws of New York, was enacted as Chapter 816 of the Laws of 1913 (Volume 4, p. 2277, *et seq.*), and was re-enacted by Chapter 41 of the Laws of 1914 (Volume 1, p. 216, *et seq.*). Subsequently, after various amendments, the statute, together with all amendments, was embodied in Chapter 615 of the Laws of 1922 (p. 1623, *et seq.*).

Since this court is believed to be familiar with the general plan and scope of this statute and with its essential features, reference to its pertinent provisions is here omitted. The statute will be referred to in some detail in the appendix.

The petitioners urge that by reason of the grant to the Federal government of jurisdiction in matters of admiralty and maritime jurisdiction contained in Article III, section 2, and in Article I, section 8, of the Constitution of the United States, and also of the provisions of section 24, clause 3, and of section 256 of the Judicial Code, U. S. C., Title 28, sections 41 and 371, the respondent State Industrial Board of the State of New York was without jurisdiction to hear and determine Heaney's claim and to grant him an award against the petitioners for compensation for the injuries suffered as above stated; and that the judgment herein of the said Court of Appeals of the State of New York, made and dated November 19, 1935, affirming said award, is erroneous and should be reversed by this court.

The date upon which the petitioners presented to Honorable Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York, application for appeal therefrom to this court is February 14, 1936. An order allowing an appeal herein was made by the said Chief Judge on the 15th day of February, 1936 (R., 72, 73).

Ruling Below.

The respondent Heaney presented to the respondent State Industrial Board of the State of New York a claim for compensation under the statutes of New York hereinabove referred to. On the hearings had before the said Board, the petitioners objected to the jurisdiction on the ground that the subject matter of the claim, an accident and injury occurring on navigable waters of the United States, is a maritime matter within the exclusive admiralty jurisdiction of the United States (R., 13). The said Board made a finding that it had jurisdiction (R., 7) and granted an award of compensation in favor of Heaney against the petitioners (R., 7).

Upon appeal by these petitioners from said award to the Appellate Division of the Supreme Court of New York, Third Judicial Department, as provided by law, judgment was rendered against the petitioners, affirming said award (R., 52). Thereafter, upon appeal to the Court of Appeals of the State of New York from said judgment, pursuant to permission duly granted to the petitioners by the said Court of Appeals (R., 53, 54), the latter court affirmed the said judgment (R., 1). In both said courts the petitioners contended upon said appeals that the subject matter of the case is maritime and is within the exclusive admiralty jurisdiction of the United States, by virtue of Article III, section 2, of the Constitution of the United States and of section 24, clause 3, and of section 256 of the Judicial Code; U. S. C., Title 28, sections 41 and 371.

In the said decision and judgment of the Court of Appeals, here under review, that court certified (R., 1, 2):

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. It relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the Workmen's Compensation Law of the state applied, and that the Federal courts had not exclusive jurisdiction to afford relief."

Statement of the Case.

The petitioner The Travelers Insurance Company is the compensation insurance carrier of the petitioner P. J. Carlin Construction Co. The award of compensation was made against the petitioners upon the theory that the respondent Heaney was at the time of the occurrence of his injuries an employee of the petitioner P. J. Carlin Construction

Co. and that his injuries arose out of and in the course of his employment (R., 5).

The respondent Heaney suffered bodily injury from the destruction and sinking of the steamboat "Observation", a major disaster which occurred in the East River, New York Harbor, on September 9, 1932. He was at the time a passenger on the vessel, having taken passage from East 136th Street, Manhattan, to Rikers Island, lying in New York Harbor. He paid a fare of ten cents for the round trip (R., 18, 19, 20).

At the time of the occurrence, the boat had left the dock at 136th Street (R., 18) on a voyage to Rikers Island, which was distant from one to two miles from the point of departure (R., 26). The accident occurred in the East River, in navigable waters of the United States (R., 18).

The cause of the disaster is not disclosed in the record, other than the fact that there was a violent explosion in or near the vessel (R., 18). Many persons on board lost their lives and many others were injured, including the respondent Heaney.

Mr. Heaney lived in the Bronx, New York City (R., 11, 14). He was a bricklayer, who had worked for the petitioner P. J. Carlin Construction Company on construction work on Rikers Island (R., 14, 17). When injured, he was journeying from his home to Rikers Island to do work there for the petitioner Carlin Company (R., 14, 17, 18). His wages were calculated upon an hourly basis (R., 17). The time for which he was paid began after he reached the island and ended before he left it (R., 20).

The petitioner Carlin Company was one of a number of contractors engaged in the work of constructing buildings on Rikers Island for the City of New York (R., 26, 27). On the vessel at the time of the catastrophe were a large number of workmen who were on their way to Rikers Island, there to do work for the various contractors (R., 22).

The steamboat "Observation" was being operated in a ferry service which was maintained primarily for the purpose of affording workmen wishing to go to Rikers Island to engage in this construction work a means by which they could secure passage to the island (R., 21, 22, 39, 41). It was a "large" steamboat, capable of carrying 250 passengers (R., 22).

Rikers Island, the property of the City of New York, was used by it exclusively as a place of confinement of criminal prisoners (R., 26, 28). While the city maintained a ferry service from Manhattan to the island for its own purposes (R., 17, 19, 27, 28), it did not undertake in its contracts with the various contractors to provide "regular ferry service" for the transportation from mainland to island of men and materials for the construction work there to be done (R., 15); but there was inserted in each of the various contracts which the city had made with the different contractors, a provision whereby it was pointed out that the subject of such transportation was the concern of the other contracting party (R., 15, 26, 27).

For a time the workmen used the municipal ferry in going to Rikers Island (R., 29, 32). When, after a time, the city declined to permit the further regular use of its ferry for this purpose (R., 32), the petitioner Carlin Company made an arrangement with one George I. Forsyth (R., 28, 33), whereby it gave its license or consent that Forsyth operate a ferry service to Rikers Island upon schedules to be indicated by it, and whereby it assured Forsyth that the receipts by him of fares from his passengers of ten cents a round trip would equal $60.00 a day, and promised to pay him any deficit or difference between said amount and the daily fares received by Forsyth from the passengers (R., 46, 47). Forsyth manned and operated the vessel and paid the crew (R., 36, 39). He received the fares that the men paid for their transportation (R., 33 to 38). At stated intervals Forsyth collected from the petitioner Carlin Company the amount of the difference between the

fares he had received and the sum above indicated (R., 36).

The vessel was operated by Forsyth in this ferry service five days a week—Monday to Friday, inclusive—during certain hours of the day (R., 29, 30, 46, 47, 40). On other days, and, upon occasion, at night, the vessel was operated by Forsyth in special excursions with which the petitioner Carlin Company had no concern (R., 21, 22, 39, 41).

The steamboat "Observation" was not owned, operated nor controlled by the petitioner Carlin Company (R., 28).

Assigned Errors Intended to Be Urged.

The petitioners assign the following errors (R., 70, 71) in the record and judgment of the said Court of Appeals of the State of New York, to wit, that the said court erred in its said decision and judgment as follows:

1. In ruling that the subject matter of this case is of local concern and subject to the regulation of the State of New York.

2. In ruling that this case involves a contract matter and that said contract matter is of a non-maritime nature.

3. In ruling that the Workmen's Compensation Law of the State of New York is a valid law, applicable to this case.

4. In failing and refusing to rule that the subject matter of this case is a maritime matter, governed by the principles of the maritime law of the United States.

5. In failing and refusing to rule that courts administering the maritime law of the United States have exclusive jurisdiction to determine the rights and the liabilities of the respondent Heaney and the petitioners in respect of the subject matter of this case.

6. In failing and refusing to rule that the Workmen's Compensation Law of the State of New York is contrary to Article III, section 2, of the Constitution of the United States and to sections 24 and 256 of the Judicial Code, U. S. C., title 28, sections 41 and 371, in that it assumes to confer upon the respondent State Industrial Board of the State of New York jurisdiction to hear and determine a claim for statutory workmen's compensation in a matter of admiralty and maritime jurisdiction.

7. In giving judgment herein against the petitioners and in favor of the respondent Heaney, affirming the award herein of the respondent State Industrial Board of the State of New York and the judgment herein of the Appellate Division of the Supreme Court of New York, Third Judicial Department, affirming said award.

8. In failing and refusing to give judgment herein in favor of the petitioners, on the ground that the said Workmen's Compensation Law of the State of New York is unconstitutional and void in that said statute, in so far as it purports to fix, determine and regulate the rights of the respondent Heaney against the petitioners and the liabilities of the petitioners to said respondent Heaney is repugnant to and prohibited by Article III, section 2, of the Constitution of the United States and sections 24 and 256 of the Judicial Code, U. S. C., title 28, sections 41 and 371.

Summary of the Argument.

I.

The entire subject of legal liability arising out of bodily injury suffered by a passenger in a shipwreck occurring in transportation over navigable waters of the United States is a maritime matter falling within the exclusive

jurisdiction of the United States, by virtue of the provisions of Article III, section 2, and of Article I, section 8, of the Constitution of the United States.

The general maritime law as enunciated by the courts, together with many statutes of the Congress and rules and regulations of the Federal Executive, constitute an elaborate and comprehensive body of law dealing in great detail with the entire subject of transportation by water and related matters.

Injury and damage arising out of a maritime disaster lie at the heart and center of the principal subject with which admiralty jurisdiction is concerned—transportation by water.

The locality of the injury is the controlling consideration which determines whether such a case is one falling within admiralty jurisdiction.

II.

Heaney's injury was maritime. It bears the closest relation possible to navigation and commerce, since it not only occurred in the actual course of navigation but arose directly out of the very fact and act of navigation.

Heaney was on the boat both as a passenger of Forsyth and as an employee of Carlin, engaged to make a voyage for his employer.

The relevancy of the relation to navigation and commerce of an employee's *work* lies in its bearing upon the relation of the *injury* to navigation and commerce.

The controlling consideration is not the exact nature of the work that the employee is engaged generally to do, but whether the employment subjects the employee to the perils of transportation by water or activities related thereto and whether the injury results, on the water, from such perils.

Though Heaney's regular work was laying brick on land, the findings of fact, now final and binding on all parties, show that he entered upon his employment when he set foot on the vessel and that his injury was suffered not only in the course of his employment but arose out of that employment.

Thus Heaney's employment embraced and included the making of a voyage across the East River and the consequent risks inseparable from such an undertaking.

This part of Heaney's employment was clearly maritime; and it was precisely this maritime part of his employment which created a purely maritime risk that ripened into an injury which was likewise purely maritime.

Maritime rights both of Heaney and the Carlin Company are involved—the right of the latter to immunity is a valuable right. Admiralty is solicitous of the rights of all concerned—libellees as well as libellants.

III.

It is not essential to the application of the maritime law that the matter involved relate to interstate or foreign commerce. Federal jurisdiction over the latter is conferred by a separate, distinct and independent grant in the Constitution.

IV.

The absence of any wrongful act or neglect on the part of the petitioner Carlin Company which would make it liable to Heaney under any known principle of the maritime law does not deprive the admiralty courts of their jurisdiction.

No one will maintain that in order that a court of admiralty have jurisdiction of a suit the libellant must have

a valid claim against the libellee. A decree of exoneration from liability, equally with a decree granting a recovery of damages, is made in the exercise of jurisdiction. It is not a denial of jurisdiction.

V.

The subject matter of this case is not of purely local concern nor is it within the jurisdiction of the State of New York.

It is unimportant that most of the employer's work and most of the work of the injured employee is done upon the land. Whenever an employer sends an employee upon a vessel and injury occurs there in connection with the employment, admiralty has jurisdiction of the subject of the injury.

The fact that the employer, in obedience to state law, had insured workmen's compensation to its employees who might be injured while working on Rikers Island, in no way affects the questions involved in this case.

VI.

This proceeding to recover compensation under the provisions of the New York Workmen's Compensation Law is not a common law remedy saved to suitors by Section 256 of the Judicial Code; U. S. C., Title 28, section 371.

VII.

The provision of the New York Workmen's Compensation Law making it the exclusive source and measure of the employer's liability is an essential part of it; so that the whole statute is invalid and inapplicable as to a mari-

time injury, since this essential provision is beyond the power and jurisdiction of the State to make or to enforce.

VIII.

The New York Workmen's Compensation Law, as applied to a maritime injury, is invalid in that it purports and attempts to work an assignment or transfer of the employee's cause of action against a negligent third person—a provision that is beyond the power of the State to make or to enforce; and in that it purports and attempts to impose upon a negligent third person, under certain circumstances, an added liability of a nature wholly foreign to and incompatible with the maritime law.

IX.

The test of the locality of the injury furnishes the only workable rule by which may be avoided not only defeat of the main purpose and end of the constitutional grant to the Federal government of exclusive jurisdiction over maritime matters, but also many situations from which inevitably would result uncertainty, confusion and injustice.

X.

The judgment below should be reversed, with costs, and the cause remanded, with instructions that Heaney's claim under the New York Workmen's Compensation Law be dismissed.

ARGUMENT.

POINT I.

The entire subject of legal liability arising out of bodily injury suffered by a passenger in a shipwreck occurring in transportation over navigable waters of the United States is a maritime matter falling within the exclusive jurisdiction of the United States, by virtue of the provisions of Article III, section 2, and of Article I, section 8, of the Constitution of the United States.

The court below has construed the New York Workmen's Compensation Law as having the purpose and the effect of regulating and determining the rights, the liabilities and the remedies of respondent Heaney and of the petitioners growing out of the destruction and sinking of the steamboat "Observation" in the waters of the East River on September 9, 1932.

The statute, therefore, will be considered as though in specific terms it provided for liability under the precise facts disclosed by the uncontradicted evidence in this case.

Cudahy Packing Co. v. *Parramore,* 263 U. S. 418, 422;

Ward v. *Krinsky,* 259 U. S. 503, 510.

Before the State Industrial Board (R., 13) and in the courts below the petitioners urged that there was no such connection between Heaney's employment and his injury as would justify an award against the petitioners—that the injury did not arise out of Heaney's employment nor in the course of it. If that contention was sound, it would necessarily follow that the award and the statute upon which it is based are violative of the petitioners' rights under provisions of the Constitution of the United States other than those to which reference is hereinabove made.

In view, however, of the decision of this court in *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 422, wherein this court held that circumstances apparently analogous to

those here involved were sufficient to support a finding of a causal relation between the injury and the employment, the petitioners consider that the findings of fact upon which the award is based, namely, that Heaney's injury occurred in the course of his employment and arose out of it (R., 5), are final and binding upon all the parties to this appeal.

The question is here presented for determination in this case whether the statute, construed and applied as above indicated, is valid and applicable, in view of the provisions of Article III, section 2, and Article I, section 8, of the Constitution of the United States, granting to the Federal government jurisdiction in matters of a maritime nature.

It is not deemed necessary to discuss the decisions of this court by which these constitutional provisions have been interpreted as not only granting to the courts of the United States jurisdiction in maritime matters but also to the Congress of the United States the power and right to amend, modify and supplement the general maritime law existent at the time of the adoption of the Constitution.

Panama R. R. Co. v. Johnson, 264 U. S. 375;
Chelentis v. *Luckenback S. S. Co.,* 247 U. S. 372;
Robins, etc., Co. v. *Dahl,* 266 U. S. 449;
Engel v. *Davenport,* 271 U. S. 33;
Panama R. R. Co. v. *Vasquez,* 271 U. S. 557;
Butler v. *S. S. Co.,* 130 U. S. 527;
The Lottawana, 21 Wall. 558.

In the exercise of its jurisdiction under this Constitutional grant, Congress has enacted a large mass of legislation regulating in great detail not only the subject of transportation by vessel and of navigation generally, but also many other matters incidental thereto; for example, the construction, enrollment, licensing and inspection of vessels, their machinery, and equipment, and the examination and licensing of officers (U. S. C., titles 33 and 46). Congress has also empowered the executive branch of the government to make, promulgate and enforce rules and

regulations to that end. Pursuant to this authority the Department of Commerce has adopted and published an elaborate code known as the General Rules and Regulations, which deals with the subject of such transportation and matters incidental thereto in the most minute detail.

The result of all this has been and is that today the maritime law of the United States constitutes an elaborate and comprehensive system or body of law dealing with the whole subject of transportation by water.

The principal subject of admiralty and maritime jurisdiction is the transportation by water of passengers and cargo. That jurisdiction extends also to many matters incidental to this principal subject.

So that when, as here, we are concerned with a catastrophe by which a vessel is destroyed in the course of her voyage and the transportation abruptly ends, with resulting injury and damage, we are dealing with a matter lying at the heart and center of the subject with which admiralty jurisdiction is concerned—the principal matter which all the elaborate principles, rules and regulations of the legislative, executive and judicial branches of the Federal government are designed to regulate. All these have as their main purpose and end to promote safety of person and property in transportation by water, and to regulate the subject of liability for injury and damage occurring in and incidental to such transportation, including the regulation of the question who shall be liable, in what circumstances, and to what extent.

In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 386, 387, this court said:

> "When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized."

And the court proceeded to point out that the legislation must be within the

> "boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without."

And further that, aside from some exceptional situations, the legislation

> "shall be co-extensive with and operate uniformly in the whole of the United States."

Whatever may be the exact boundary lines by which the admiralty jurisdiction of the United States is separated from the jurisdiction reserved to the states, it is unquestionable that injury resulting from the destruction of a vessel while being navigated in the carriage of persons or property involves a matter which constitutes the very essence of admiralty jurisdiction. Suits arising from such a cause are numerous and are typical. Admiralty courts of the United States take jurisdiction of them whenever that jurisdiction is invoked. While state courts have concurrent jurisdiction when the suit is not *in rem*, in taking it they exercise admiralty jurisdiction and administer the maritime law of the United States.

> *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384;
> *Messel* v. *Foundation Co.*, 274 U. S. 427;
> *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259;
> *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557, 560.

The only ground, therefore, upon which jurisdiction of admiralty over the case at bar may be questioned must of necessity be that the relations of the parties herein to each other and to the vessel were such that they are excluded

from the power and jurisdiction of the Federal authorities to deal with and to regulate. The fallacy of the suggestion is apparent from the mere statement of it.

Certainly it is not essential to admiralty jurisdiction that the claimant have a direct relation to the vessel, as member of the crew or even as passenger, or that the one sought to be held liable be the owner or charterer.

Leathers v. *Blessing,* 105 U. S. 626;
Northern Coal & Dock Co. v. *Strand,* 278 U. S. 142;
Baizley Iron Works v. *Span,* 281 U. S. 222;
Messel v. *Foundation Co.,* 274 U. S. 427;
Robins, etc., Co. v. *Dahl,* 266 U. S. 449.

Admiralty jurisdiction under the Federal Constitution "embraces two great classes of cases—one dependent upon locality, and the other upon the nature of the contract". These words from Story on Constitution, 4th ed., section 1666, were quoted by this court in *Union Fish Co.* v. *Erickson,* 248 U. S. 308, 312.

Whatever may be said as to whether this case falls within the second class above indicated (which will be discussed at a later point), it is clear beyond peradventure that it falls within the first.

In *The Plymouth,* 70 U. S. (3 Wall.) 20, this court said:

> "The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

See also

Netherlands, etc., Co. v. *Gallagher,* 282 Fed. 171, 176, 177.

If New York had no compensation statute and if Heaney had brought suit *in personam* against the Carlin Company in a court of admiralty, would anyone doubt the jurisdiction of the court to hear and determine the merits of the cause in the light of the principles of the maritime law of the United States?

And if admiralty would have had jurisdiction of such a cause *before* the enactment of the New York Workmen's Compensation Law, will anyone contend that by the enactment of that statute the State of New York deprived the courts of admiralty of that jurisdiction?

The case at bar is controlled by the decision of this court in *Spencer Kellogg and Sons, Inc.*, v. *Hicks*, 285 U. S. 502. In that case the employer was engaged in the manufacture of linseed oil at a factory at Edgewater, N. J., on the west shore of the Hudson River, opposite 96th Street, New York City; and it there employed many workmen who lived in New York City. The accident and injury occurred by the sinking of the vessel by means of which some of these workmen were being ferried across the river to the employer's factory. New Jersey had a compensation statute; and if the injury had occurred in the employer's factory, that statute unquestionably would have provided the exclusive source and measure of the employer's liability. Yet this court held (at p. 513):

> "The workmen's compensation law of New Jersey, the purpose of which was to supersede the common law redress in tort cases and statutory rights consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration."

There, as here, "The ferriage was for the facilitation of the company's business and for its convenience as well

as that of the employees." (Pp. 512-513.) And the New Jersey compensation law, like that of New York here involved, is applied to certain cases arising in transportation to and from the place of work, the courts of that state holding that the relation of employer and employee exists during such transportation. *Depue* v. *George D. Salmon Co.*, 92 N. J. L. 550; *Alberta Contracting Corp. v. Santomassimo*, 107 N. J. L. 7.

The *Spencer Kellogg* decision would seem clearly to establish the proposition that in any case where, under the maritime law, an employee has a cause of action against his employer by reason of having suffered a maritime injury, no state has the power to divest him of it and to substitute therefor another and different right and remedy. Indeed, this decision would seem to have been the inevitable one in view of many prior decisions of this court. For otherwise it would be necessary to hold not merely that the state has *concurrent* jurisdiction with the Federal government to determine and fix the law to be applied to a maritime case (an untenable position) but that the state's jurisdiction is *paramount;* with the manifest result of defeating the very object and purpose of the Constitutional grant to the Federal government—uniformity of the maritime law that shall prevail throughout the country.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 217.

Of course, the true rule, long recognized and established, is that *exclusive* jurisdiction to prescribe what shall be the substantive law governing such a case is granted by the Constitution to the Federal government.

In *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 372, 382, this court said that

> "no state has power to abolish the well recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the com-

mon law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states'."

In *Robins, etc.*, v. *Dahl*, 266 U. S. 449, 457, this court said:

"The rights and liabilities of the parties arose out of and depended upon the general maritime law, and could not be enlarged or impaired by the state statute. [Citing cases.] They would not have been different if the accident had occurred at San Francisco."

In *Engel* v. *Davenport*, 271 U. S. 33, 39, referring to and quoting from *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 392, this court pointed out that the maritime law has a uniform operation which may not be deflected from "by local statutes or local views of common law rules".

In the majority opinion in the court below it is said that since "no recovery is sought against the employer in this case because of any wrong alleged to have been done by the employer", the question presented is "whether the contract of employment is maritime in its nature" (R., 56). Followed to its logical conclusion this line of reasoning would deprive the courts administering the maritime law of jurisdiction in such a case as the present one whenever the employee chose to pursue a claim for compensation under a local statute. It would give the employee the right to elect whether to sue for damages under the maritime law or to receive compensation under the state statute—a result which demonstrates that the argument is faulty. For there is no room for an election. It is a question of jurisdiction of the subject matter. Either it is granted to the Federal government or it is reserved to the states. In

either event, it is exclusive, so far as substantive rights are concerned. By the Federal Constitution (Article III, section 2 and Article I, section 8) as construed by this court, the Federal law is exclusive in fixing substantive rights "in all cases of admiralty and maritime jurisdiction". Furthermore, to allow the employee the right of election would be contrary also to the state compensation statute, for by its express terms the rights and remedies thereby created are made exclusive, with certain exceptions not here applicable (section 11).

The majority opinion below proceeded upon the theory that "in considering this case it is necessary to determine, first, whether it involves a contract matter or a tort matter, and, secondly, if a contract matter, whether the contract was maritime in its nature" (R., 55); and, as we interpret the opinion, the conclusion arrived at was that this case involves a contract matter. This conclusion apparently was based upon language taken from a prior decision of the court below in Matter of *Doey* v. *Howland Co.*, 224 N. Y. 30 (R., 56). This language was inadvertently quoted as the language of this court in the *Nordenholt* case, 259 U. S. 263, 271. It was to the effect, in part, that an award under the Workmen's Compensation Law is "upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. * * * The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents." It is true that this court, in the *Nordenholt* decision, did quote the language in question from the opinion of the New York Court of Appeals in the *Doey* case. But it is also true that this court did not adopt or approve the language quoted. On the other hand, it reached the conclusion that "the court below has made deductions from *Southern P. Co.* v. *Jensen*, *Clyde S. S. Co.* v. *Walker*, and *Knickerbocker Ice Co.* v. *Stewart*,

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which we think are unwarranted, and has proceeded upon an erroneous view of the Federal law"; and accordingly reversed the decision of the New York Court of Appeals in the *Nordenholt* case. It is our understanding that the view that this court has consistently taken of the nature and purpose of workmen's compensation statutes is that expressed in *Spencer Kellogg & Son, Inc.*, v. *Hicks*, 285 U. S. 502, at page 513, as follows:

> "The workmen's compensation law of New Jersey, the purpose of which was to *supersede the common law redress in tort cases* and statutory rights consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration." (Italics are ours.)

The sound and accurate view, therefore, as well as the practical one, is to regard this new right of statutory compensation in the light of the fact that it is the successor of and substitute for the tort law of master and servant.

In *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, this court explicitly held that workmen's compensation legislation does not rest upon the idea of implied contract. The court there said (p. 423):

> "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital, —the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears

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to the employment because of and in the course of which he has been injured."

The conclusion of the majority of the court below that since an award of workmen's compensation is not based upon any wrong done by the employer to the employee jurisdiction depends upon the nature of the contract of employment rather than upon the locality of the occurrence out of which the injury arose, seems clearly to run counter to the decision of this court in *Crowell* v. *Benson,* 285 U. S. 22. In that case the court was dealing with an award made under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, chap. 509, 44 Stat., at L. 1424, U. S. C., title 33, §§901-950). The opinion of the majority of the court, delivered by Mr. Chief Justice Hughes, discloses that the award "rested upon the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States" (p. 37). In the course of the opinion, the Chief Justice used the following language:

"As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const., Art. 3, § 2; *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128, 138) and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute" (p. 39).

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition

precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute" (pp. 54 and 55).

As the locality of the injury determines the existence of the congressional power to create the liability prescribed by the Federal Longshoremen's and Harbor Workers' Compensation Act, the locality of the injury likewise determines the existence of the power of the State of New York to create the liability prescribed by the New York Workmen's Compensation Law. For the nature of the liability prescribed by these two statutes is identical. It is the consideration of locality that determines the boundary separating the two jurisdictions.

POINT II.

Heaney's injury was maritime. It bears the closest relation possible to navigation and commerce, since it not only occurred in the actual course of navigation but arose directly out of the very fact and act of navigation.

"Not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce." *Great Lakes, etc.,* v. *Kierejewski,* 261 U. S. 479, 481.

The injuries which Heaney suffered by the wreck of the vessel by which he was being transported manifestly have the closest and most direct relation possible to navigation and commerce. They arose in the course of and directly out of the very act of transportation.

In many cases in this court the question has been discussed whether the injured's work out of which the injury arose had direct relation to navigation and commerce. And it has been repeatedly held that the repairing, loading and unloading of a vessel, while only incidental to the principal subject of actual transportation, yet are sufficiently closely connected therewith that it may be said that there is a direct relation. All the more reason, then, for holding the present case to be one of maritime jurisdiction, since it arose directly out of the actual transportation of the claimant.

The relevancy of the inquiry as to the relation to navigation and commerce of the employee's usual and principal *work* is that ordinarily his injury arises out of the hazards associated with that particular work; so that by determining the relation of this *work* to navigation we arrive at the actual question which is the important and controlling consideration, namely, *the relation of the injury to navigation and commerce.* In this case the injury arose

directly out of the very act and fact of navigation. The relation can never be closer than it is in this case.

While in a number of the cases which have come before this court relating to the applicability of state compensation laws, the fact has been noted in the court's opinions that the claimant's employment was maritime in character, so far as counsel are aware this court has never held that it is essential to maritime jurisdiction that the work of the claimant be maritime. Indeed, the decision of this court in the *Spencer Kellogg* case, 285 U. S. 502, shows that this is not an essential factor. In that case, those who were killed or injured in the disaster included regular employees engaged to work in the employer's plant in the manufacture of linseed oil. Also included were workmen who had been given employment check stubs and told to report on the morning of the accident to engage in discharging the cargo of a ship. Unlike the work of the regular factory employees, the work of this latter class was of a maritime nature. The District Court and the Circuit Court of Appeals differentiated these two classes of workmen, holding as to the regular factory workers that they must be dismissed from the case, as any redress to which they were entitled was under the New Jersey compensation law. Only one member of this court, however, Mr. Justice Sutherland, voted to affirm this ruling. The majority of this court held the New Jersey statute inapplicable. Mr. Justice Brandeis and Mr. Justice Stone concurred in the conclusion as to the employer's liability in admiralty (p. 515), but did so "upon the ground that the owner having invoked, as stated, the jurisdiction in admiralty, it cannot be surrendered in favor of that under the workmen's compensation law of the state". It does not appear from the report of this case whether these two members of the court grounded their conclusions that admiralty had jurisdiction upon a theory of *estoppel* or upon the ground that when *any* party to the controversy invokes admiralty jurisdiction by pur-

suing an available remedy accorded by the maritime law, the jurisdiction thereby gained by the court will not be surrendered. As above indicated, Mr. Justice Sutherland apparently was the only member of this court who considered that admiralty did not have jurisdiction, or who indicated an opinion that there was any sound distinction to be drawn between the workmen who were on their way to do maritime work in discharging a vessel and those who were to work in the employer's factory on land.

The conclusion which the petitioners draw from this decision is that *the controlling inquiry is whether the employment subjects the employee to the perils of transportation by water, and the injury results from those perils. If so, and if the injury occurs on the water, it is a case of admiralty jurisdiction.*

In the majority opinion below, it is said (R., 56):

> "The contract of employment was for the services of the claimant in the erection of a building. It was not a contract to do work upon a vessel in navigable waters nor even to do work remotely connected with any undertaking having to do with navigation or commerce."

Manifestly, there is force in this suggestion. In fact, it was the underlying ground of the petitioners' contention, urged upon the Industrial Board and the courts below, that Heaney's injury did not occur in the course of his employment nor arise out of that employment. But the findings of fact, which the court below has held are supported by the evidence, and which are now binding upon all the parties, completely destroy this argument which otherwise would be an unanswerable one. Apparently recognizing that if Heaney's work was not even "remotely connected with any undertaking having to do with naviga-

tion or commerce", the basis of an award in his favor would be utterly lacking, the learned court below thereupon continued (R., 56):

> "The presence of the claimant upon the boat was a mere incident of the contract of employment, it having been found as a fact that he was on the boat as an employee of the contractor against whom the award has been made."

But it was precisely this "incident" of the employment which created risks of a purely maritime nature—risks that developed into an injury which was likewise purely maritime. There was no remoteness in the relation between this maritime risk and the injury. The remoteness lay in the relation between the risks of maritime travel and those ordinarily associated with laying brick in the erection of a building on the land.

If the work that Heaney expected to engage in when he reached Rikers Island had been of a maritime nature, for example, to assist in unloading a vessel lying at a dock at Rikers Island, this point made in the majority opinion in the court below would be wholly lacking. And yet, his relation to the "Observation" and to the risks of travel upon it would have been precisely the same as they actually were at the time when he received his injuries.

That the nature of the employment is not the controlling consideration, but rather the *locus* of the accident and injury, is demonstrated by the decision of this court in *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, where the accident and injury arose out of stevedoring work, the employee who was injured and killed being a longshoreman. The vessel was being unloaded—work which this court has frequently ruled to be maritime in character.

> *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52;
> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

Although the work of discharging the cargo of a ship is by its very nature a single and indivisible operation, maritime in character, yet this court held that if the longshoreman be injured while on the dock, the subject of his claim is not within the admiralty jurisdiction but rather within the jurisdiction of the workmen's compensation law of the state.

In the unanimous opinion of this court in the *Nordenholt* case (259 U. S., at p. 272), the court said:

> "When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

In other words, the same man in the same employment has one right and remedy if injured on the dock and a different right and remedy if injured on the ship.

See also

> *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647;
> *Smith & Son* v. *Taylor*, 276 U. S. 179.

That the bricklaying work which Heaney expected to do after he reached Rikers Island was not work of a maritime nature is, of course, true. No one questions that proposition. It is self-evident. But the ruling below, upon which this judgment stands, was that bricklaying on Rikers Island

was not the whole of Heaney's employment; that his employment did not begin on Rikers Island nor end there; but rather that it began the moment he set foot upon the steamboat (R., 5). If the ruling had been otherwise (as the petitioners contended below it should be), it would have precluded the possibility of an award; for the statute provides for an award only if the injury arise out of and in the course of the employment. The judgment is founded upon the theory, evidenced by the findings made by the State Industrial Board, that the relation of employer and employee existed at the time of the catastrophe, and that the relation of both employer and employee to the voyage of the "Observation" in the course of which and out of which the injury arose, was such as to bring the case within the statute. In other words, *Heaney's employment embraced and included the making of a voyage across the East River on the "Observation" and the consequent risks inseparable from such an undertaking.*

Heaney was on the vessel as a voyager. His injury occurred in the course of the voyage and arose directly out of the risks incidental thereto. It having been found as a fact that the injury occurred in the course of his employment and arose out of that employment, the conclusion is inescapable that while on the boat the work that he was doing for his employer was the making of the voyage; for there was no proof and no finding nor any suggestion, that while on the boat he was doing anything for his employer other than making the voyage. To that extent, therefore, Heaney's employment was clearly maritime. And it was precisely this maritime part of Heaney's employment which was the source of the risk that actually produced the injury, which was likewise maritime.

If there be incongruity in this concept, the petitioners are not responsible for it. It is not their child and may not be laid at their door. They have consistently denied it from the outset. But we suppose it is now *fait accompli.*

Inherent in the judgment, it is a factor to be reckoned with and not to be eliminated so long as the judgment stands. But, if binding upon the petitioners and upon this court, it is equally binding upon the respondents. They may not now disown it if it threaten to become a burden. It is probably true that the respondents' acknowledgment of paternity was not altogether a matter of free choice. For it was necessary to link up Heaney's employment with the maritime risks incidental to the voyage of the "Observation" if he were to receive an award for his injuries. Facing the obvious dilemma, the choice made is evidenced by the following findings of the State Industrial Board (R., 5, 7):

> "3. The injuries sustained by the said Edward Heaney were accidental injuries and the said Edward Heaney stepped into his employment the moment he stepped aboard the said steamboat 'Observation'. Therefore, the injuries which he sustained as aforesaid arose out of and in the course of his employment."
>
> "10. Such transportation by means of the steamship 'Observation' was included within and was part of the contract of employment between P. J. Carlin Construction Co., the employer herein, and Edward Heaney, the claimant, and was an incident of the claimant's employment."

If it be true that the relation between Heaney's employment as a bricklayer on Rikers Island and his injuries sustained in reaching his place of employment by taking passage on the steamboat, is not so remote or tenuous as to preclude the remedy of workmen's compensation as an arbitrary, unreasonable and capricious exercise of jurisdiction by the state, then by the same process of reasoning, it must follow that it is within the power of Congress, if

and when it sees fit to exercise that power, to provide a broad scheme of workmen's compensation which would cover all cases of injury in the course of employment arising out of accidents occurring in transportation over navigable waters of the United States. It is not an objection to Federal jurisdiction that the duties that the servant expects to perform when he reaches land are not of a maritime nature, since the subject matter of the accident and injury clearly falls within admiralty and maritime jurisdiction.

The maritime law was early in the field of compensation to workmen irrespective of fault on the part of the employer. So far as we know, it was the first in that field. We refer to the doctrine of maintenance and cure. (*The Osceola,* 189 U. S. 158, 175.) Its limitations as to benefits conferred and as to the classes of beneficiaries were such that Congress doubtless considered that it was not adequate in modern conditions, under which much of the work incidental to undertakings of a maritime nature is performed by persons other than members of the crew. So that the maritime law was amended by Congress in important particulars—notably by the Longshoremen's and Harbor Workers' Compensation Act and by the Jones Act. Of these, the former (March 4, 1927, Chap. 509; 44 Stat., at L. 1424; U. S. C., title 33, sec. 901), while in its nature similar to the old doctrine of maintenance and cure, sets up an analogous although somewhat different schedule of benefits conferred and also supplements the ancient rule by including within its beneficiaries classes of workmen who were in no wise affected by the earlier principle. It is not necessary to consider whether Heaney might have secured an award of compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act if he had seen fit to assert a claim under it. Suffice it to say that the words of the statute make it clear that thereby Congress did not assume to cover the entire field

lying within its power and jurisdiction, relating to the subject of compensation to employees for injury. (See sections 2[3] and 3.)

By the Jones Act (March 4, 1915, chap. 153; 38 Stat., at L. 1185; as amended by Act of June 5, 1920, chap. 250, sec. 33; 41 Stat., at L. 988, 1007; U. S. C., title 46, sec. 688) the statutory provisions of the Federal law relating to injuries suffered by railroad employees were made a part of the maritime law; but their application was by the terms of the Act expressly restricted to seamen. Here again, Congress did not attempt to make the legislation as comprehensive in its application as was the power and jurisdiction of Congress over the subject of the Act.

The majority of the court below apparently reached the conclusion that Heaney was neither a "maritime worker" nor a "passenger in the general sense of the word" (R., 57). One is prompted to inquire, "Then, what was he?" From the uncontradicted evidence and from the findings of fact, the inevitable conclusion would seem to be that he was both. True, the Carlin Company was not the carrier. Hence, Heaney was not *its* passenger. But none the less he was unquestionably on the boat in the capacity of a passenger. When Heaney paid and Forsyth accepted a fare and the latter undertook to transport him across the East River, no one may doubt that Heaney became a passenger. It has been found as a fact that at the same time —immediately upon setting foot upon the vessel—Heaney entered upon his employment with the Carlin Company (R., 5). There would seem, then, to be no escape from the conclusion that Heaney was on the boat in two capacities. He was at once and the same time Forsyth's passenger and the Carlin Company's employee. The injury that he suffered was maritime. It occurred on the water and arose directly out of the transportation. Though his presence on the boat was in a dual capacity, he suffered but a single

injury. That injury either came within Federal jurisdiction or it did not. It will not do to say that if he sue Forsyth, his injury is within maritime jurisdiction, while if he sue his employer for the identical injury, it is not within admiralty jurisdiction but falls within the jurisdiction reserved to the states.

Maritime rights both of Heaney and of the Carlin Company are here involved. As to Heaney, though he may truly have no right of recovery against his employer in the present state of the maritime law, yet if he chose to *claim* such a right by proceeding diligently and in accordance with the practice of the courts, he would assuredly be entitled to his day in court, even though failure to secure a decree or judgment in his favor should be the inevitable result. His injury being of a maritime nature, a court of admiralty could not deny him a hearing. It would have jurisdiction.

As to the Carlin Company, if the maritime law does not impose upon it liability to Heaney, then that law grants unto it *immunity;* and its right to a decree of an admiralty court exonerating it from liability, or to a judgment in its favor under the forms of common law procedure, is a valuable right under the maritime law which is plainly violated by the award of the State Industrial Board and by the judgment of the court below affirming it.

If the respondent Heaney, instead of filing a claim for compensation with the State Industrial Board had gone into a court of admiralty and had there maintained a libel *in personam* against the petitioner Carlin Company to recover damages for his injuries, there would seem to be no question that the court would exercise jurisdiction to hear and determnie the merits of his claim; and if the libellant failed to establish a ground of recovery, the libellee would be entitled to a decree exonerating it from liability.

An application of the principle that the maritime law is supreme in denying a right of recovery as well as in

granting such a right is seen in *Lindgren* v. *United States*, 281 U. S. 38, wherein this court, referring to the Merchant Marine Act, adopted by Congress in the exercise of its paramount authority in matters of maritime jurisdiction, said (pp. 46, 47), that it establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen and that this operates uniformly within all of the states and that it

> "*is as comprehensive of those instances in which* by reference to the Federal Employer's Liability Act *it excludes liability, as of those in which liability is imposed;* and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.
>
> "It results that in the present case no resort can be had to the Virginia death statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that act." (The italics are ours.)

As this is true in a case wherein the will of Congress is embodied in a single statute, it is no less true where the rights of claimant or plaintiff and the immunities and defenses of defendant are to be gathered from the whole of the maritime law including the decisions of the courts, the statutes of Congress and the rules and regulations of authorized Federal administrative bodies.

We believe that it is clear beyond dispute that the fact that Congress has not expressly declared that no state may define the obligations arising out of a personal injury to a passenger on a ship does not mean that a state may do that.

In *Southern Pacific Company* v. *Jensen,* 244 U. S. 205, at page 217, this court quoted from a prior decision the following:

> "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that 'commerce in that matter shall be free'. *Bowman* v. *Chicago & N. W. R. Co.,* 125 U. S. 465; *Vance* v. *W. A. Vandercook Co.,* 170 U. S. 438; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311."

And the court thereupon continued:

> "And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved."

We direct attention to the above statement that the absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Unless, therefore, under the maritime law liability is imposed upon the Carlin Company by reason of Heaney's injuries, no state may impose liability; Congress, by its silence, has so decreed. Its failure to declare that the employer of a passenger injured in a maritime disaster shall compensate the passenger is equivalent to a statement that such employer shall be under no liability so to compensate him. And no state may require such compensation. The conclusion embodied in the above quotation from the opinion in the *Jensen* case was vital to the determination of that

case, as may be seen from an examination of the dissenting opinions therein; and we understand that it has since been followed and accepted as the established rule.

In *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, this court said (at p. 164), referring to the grant of maritime jurisdiction contained in the Constitution:

> "The definite object of the grant was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules, applicable throughout every part of the Union."

It would seem to be clear that notwithstanding the absence of any relationship of the Carlin Company to the steamboat "Observation" out of which would arise liability of the Carlin Company to Heaney under the principles of the maritime law, yet it by no means follows that the field is open for the State of New York to impose upon the Carlin Company liability to pay Heaney on account of the injuries that he suffered. The rights of Heaney under the maritime law do not constitute the sole consideration. The rights of the Carlin Company under that same law are of equal importance. Interference by the state with those rights would operate to destroy the uniformity of that law throughout the country quite as clearly as would interference with the rights under the maritime law of men injured in a maritime disaster.

The reasoning that underlies the judgment appealed from seems to be in substance somewhat as follows: If the one sought to be charged with liability for the payment of money on account of injuries suffered in a marine disaster bear a close relation to the vessel, for example, that of owner and operator, as in the *Spencer Kellogg* case, the

maritime law will not brook interference by a state in the formulation of rules determining liability and the limits within which that liability may be enforced; but if the relationship to the vessel of the one sought to be charged be remote or entirely absent, the maritime law will afford such a person no protection against the imposition of liability by a state. One is impelled to inquire: Upon what principle of law, of logic, or of justice and common sense does such a startling conclusion find support? The remoteness of the Carlin Company's relation to the vessel by which its employee was being transported does not alter the fact that the latter's injury was maritime, nor take the matter out of the jurisdiction of the Federal government to define and regulate the respective rights and liabilities of the parties.

Strangely enough, in the prevailing opinion below is cited the decision of this court in *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, as authority for the judgment appealed from. That case involved maritime employment—the unloading of a ship—but the accident and injury occurred "upon the dock, an extension of the land." This court, holding that the latter fact controlled, reversed the New York Court of Appeals which had denied an award under the local statute. In that case the respective contentions of the Attorney General of New York, on the one hand, and of the employer, on the other, were in substance the same as here, except that they were reversed. The learned Attorney General there successfully maintained the position now urged here by these petitioners; while the employer there advanced, without success, the position now adopted in the prevailing opinion in the court below. Apparently through inadvertence, the learned judge below, writing for the majority of the court (R., 56), quoted language from the report of the *Nordenholt* decision of this court, which in turn this court had quoted from a decision of the New York Court of Appeals in *Doey* v. *Clarence P.*

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Howland Co., 224 N. Y. 30. What this court in fact said in the *Nordenholt* decision, in reference to a lengthy quotation from the *Doey* case and from another opinion of the New York Court of Appeals, was as follows (at p. 272):

> "The court below has made deductions from *Southern P. Co.* v. *Jensen, Clyde S. S. Co.* v. *Walker,* and *Knickerbocker Ice Co.* v. *Stewart,* which we think are unwarranted, and has proceeded upon an erroneous view of the Federal law."

This court concluded its opinion in the *Nordenholt* case with this language (pp. 275, 276):

> "Insana was injured upon the dock, an extension of the land (*Cleveland, Terminal & Valley R. Co.* v. *Cleveland S. S. Co.*, 208 U. S. 316), and certainly, prior to the Workmen's Compensation Act, the employer's liability for damages would have depended upon the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. *And this is true whether awards under the act are made as upon implied agreements or otherwise.* The stevedore's contract of employment did not contemplate any dominant Federal rule concerning the master's liability for personal injuries received on land. In Jensen's Case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent Federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law. (Compare *New York C. R. Co.* v. *Winfield,* 244 U. S. 147.)" (The italics are ours.)

This line of reasoning, applied to the facts of the present case, involving as it does a maritime accident and injury and not a land accident as in the *Nordenholt* case, would seem clearly to point the way to the reversal of the judgment here appealed from.

That the place where the employee receives his injuries is conclusive in determining whether or not the matter is within exclusive maritime jurisdiction, was emphasized in *Esteves* v. *Lykes Bros. S. S. Co.*, 74 Fed. Rep. (2d) 364, in which this court denied certiorari (295 U. S. 751). In that case a member of the crew of a steamship was injured while painting the side of the vessel as he stood on the dock at which it was moored. The injury was caused by lumber falling from a sling whereby cargo was being discharged from the vessel. The injury occurred on land; and it was held that the Workmen's Compensation Law of Puerto Rico fixed the right to recover. Personal injuries, the court said (p. 365), which are inflicted on shipboard are under admiralty jurisdiction, while those occurring on land, though to maritime employees and at the ship's side, are under the local law. In that case everything except the locus was most intimately related to maritime affairs; but lacking the one requisite—the maritime situs of the injury—maritime law was not permitted to prevail.

That the place of happening of an accidental personal injury is vital in determining whether the claim comes within the exclusive maritime jurisdiction of admiralty is again exemplified by the Longshoremen's and Harbor Workers' Compensation Act (U. S. C., title 33, secs. 901, *et seq.*). That statute does not provide that application thereof shall depend upon the nature of the work being done at the moment when the injury occurs, nor even upon the nature of the work usually done by the injured employee. Under section 2, paragraph (2), the statute by its terms covers accidental injury that arises out of and in

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the course of employment. The restriction is imposed that it shall apply only if the disability or death results from an injury occurring upon the navigable waters of the United States (section 3 [a]). There is no requirement that the employment of the injured person be of a maritime nature. But the only limitation bearing on the nature of the injured man's activities or the employer's connection with maritime affairs is found in the provision of the statute whereby the word "employer" is defined as an employer *any of whose employees are employed in maritime employment upon the navigable waters of the United States* (section 2, paragraph 4). So that if the Carlin Company had had employees who were employed in maritime employment, this respondent, Heaney, would have come within the terms of the Longshoremen's and Harbor Workers' Compensation Act. The validity of that statute can no longer be questioned. It is a law enacted by the Congress in the exercise of its control over maritime matters, and the Congress based its action upon its power to regulate, restrict or extend rights and liabilities arising out of accidental personal injuries occurring upon the navigable waters of the United States. The Congress did not choose to include within the operation of the statute all employees who might meet accidental injuries upon navigable waters, but it included only those in the service of employers having one or more employees engaged in maritime employment. Obviously, the fact that an employer who may have hundreds of employees has, among them, two or three who are engaged in maritime employment is not enough to bestow upon the Federal government control over the relation between that employer and the hundreds of other employees. The explanation must be that the happening of an accident upon navigable waters is the vital and controlling consideration that gives Congress the right to enact a compensation law governing as many or as few of the accidents occurring upon navigable waters as it sees fit to include

therein. It follows that the right to legislate as to the remainder of such accidents in such a way as to create new rights and remedies or to abolish old rights and remedies recognized by the admiralty law, rests in Congress and not in the various state legislatures.

POINT III.

It is not essential to the application of the maritime law that the matter involved relate to interstate or foreign commerce. Federal jurisdiction over the latter is conferred by a separate, distinct and independent grant in the Constitution.

One point of difference between the facts of the case at bar and the facts involved in the *Spencer Kellogg* case, 285 U. S. 502, is that in this case the men were being transported across the East River from Manhattan to Rikers Island—both in the State of New York—while in the *Spencer Kellogg* case the men were being transported across the Hudson River from New York to New Jersey—interstate transportation.

While the consideration of interstate and foreign relations may have been one which influenced or induced the grant to the Federal government of jurisdiction over maritime matters, this was not made a limitation of that jurisdiction.

In *London Guarantee & Accident Co.* v. *Ind. Acc. Com.*, 279 U. S. 109, the employer was not engaged in interstate commerce. Its business was to take out daily parties seeking recreation in fishing. One of the fishing vessels broke from its mooring in the harbor and an employee who went in a rowboat to rescue the vessel and prevent its going ashore, was drowned. This court held the case was one of maritime jurisdiction and reversed a judgment of the Supreme Court of California which had affirmed an award

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under the California Workmen's Compensation Statute. Mr. Chief Justice Taft, speaking for the court, said (at p. 124):

> "Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica bay, 5 or 10 miles to the deep-sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, §2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction."

Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 640, delivering the unanimous opinion of the court, said:

> "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it can not be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

This proposition is recognized in the dissenting opinion of Mr. Justice Pitney in the *Jensen* case, 244 U. S. 205, 252, where he says:

> "The effect of the present decision cannot logically be confined to cases that arise in interstate or foreign

commerce. It seems to be thought that the admiralty jurisdiction of the United States has limits coextensive with the authority of Congress to regulate commerce. But this is not true. The civil jurisdiction in admiralty in cases ex contractu is dependent upon the subject-matter; in cases ex delicto it is dependent upon locality. In cases of the latter class, if the cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, or (probably) not upon any vessel, the maritime courts have jurisdiction."

See also

Ex parte Boyer, 109 U. S. 629;
The Plymouth, 70 U. S. (3 Wall.) 20.

In *Nogueira* v. *R. R. Co.*, 281 U. S. 128, the petitioner, a freight handler, was injured on a car float while loading freight into cars standing on the float, which was lying in navigable waters. The float was used as an adjunct to railroad transportation in interstate commerce. This court there said (at p. 138) through Mr. Chief Justice Hughes:

> "In the present instance, had the petitioner been engaged in intrastate commerce, his case still would have been within the maritime jurisdiction of the Federal courts, and he would have been denied the benefit of the state compensation law."

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 161; this court pointed out that there is a clear distinction between the situation created by the Constitution relative to maritime matters and the one in regard to interstate commerce. As to the latter, the Constitution merely grants the power of regulation, without more; with the result that

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until Congress entered the field by the exercise of the power thus granted to it, state regulations affecting interstate commerce were valid and effective. On the other hand, as to maritime matters, this court said (p. 161):

> "The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress."

Admiralty jurisdiction over the case at bar is in nowise affected by the fact that the vessel which was destroyed and sunk was used for transporting people as distinguished from carrying cargoes of merchandise.

Gibbons v. *Ogden*, 9 Wheat. 1, 215, 216;
London, etc., Co. v. *Ind. Acc. Com.*, 279 U. S. 109, 124, 125;
Kenward v. *The Admiral Peoples*, 295 U. S. 649;
The Moses Taylor v. *Hammons*, 71 U. S. (4 Wall.) 411.

POINT IV.

The absence of any wrongful act or neglect on the part of the petitioner Carlin Company which would make it liable to Heaney under any known principle of the maritime law does not deprive the admiralty courts of jurisdiction. Nor does it serve to bring the case within the jurisdiction of the Workmen's Compensation Law of the State of New York.

In the prevailing opinion below, the court said (R., 60):

> "Here, since the employer was not a carrier of passengers by water, it was not guilty of a maritime tort and

> the proceeding is not one to 'impose liability for such a tort' as the proceeding in the *Kellogg* case was held to be."

If the controlling consideration underlying the decision of this court in the *Kellogg* case (285 U. S. 502) was that the employer was guilty of actionable wrong, then the petitioners have misapprehended the significance of the decision. It is true that the employer in that case was the owner and operator of the vessel and by reason of its negligence was liable under the principles of the maritime law for the injuries and deaths of the workmen who were being transported. The petitioners have supposed, however, that the solution of the question here presented does not turn upon the presence or absence of actionable wrong on the part of the employer; but that it is a question of *jurisdiction*. As pointed out in the dissenting opinion below, in the case at bar, written by Chief Judge Crane (R., 65):

> "The fact that the employer in that case was the charterer or owner of the boat, became important and was emphasized by reason of an application made by it to limit liability to the value of the boat as permitted under Federal statute. It had nothing to do with shifting or changing the principle that passengers being transported at sea or on navigable waters by a steamer are subject to admiralty jurisdiction."

No one will maintain that in order that a court of admiralty have *jurisdiction* of a suit for damages, the libellant must have a valid claim against the libellee. For a decree of exoneration from liability, equally with a decree granting a recovery of damages, is made in the exercise of jurisdiction. It is not a denial of jurisdiction.

A court of admiralty is solicitous of the rights of all parties, not alone those of the libellant. A libellee, equally with a libellant, has rights under the maritime law.

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If it were necessary to demonstrate that the solicitude of admiralty is not alone for the protection of passengers and seamen, it would not be difficult to do so. The policy of that law looks also to reasonable and fair protection of the rights of all concerned. For example, the maritime law limits the liability of a ship owner, in a proper case, to the value of the vessel and her pending freight at the end of the voyage. Also it protects from liability a charterer who has not the possession, control and operation of the vessel.

Leary v. *U. S.*, 81 U. S. 607, 610;
Reed v. *U. S.*, 78 U. S. 591;
The Spokane, 294 Fed. Rep. 242;
The Volund, 181 Fed. Rep. 643.

If, then, a state lacks the power to deprive an injured employee of a right of action against his employer under the maritime law, it must follow that in a case where the maritime law gives the employee no right of recovery, the state is none the less without power to deprive the employer of his right of immunity. That is a valuable right of the employer in such a case, just as in another case is the right of the employee to recover damages.

Nor is the presence or absence of actionable wrong on the part of the employer a material inquiry in determining an employee's right to an award under the provisions of the state statute. By its terms the statute completely puts aside that consideration. Recovery without regard to any question of fault is a distinguishing, characteristic feature of the right created by the state compensation statute. That, in any case, the right of the employee to an award should find its sole support in the *absence* of any fault on the part of the employer not only would be a most amazing situation but it would be contrary to the theory of the very statute upon which the award would rest.

An examination of the decisions of this court holding state workmen's compensation laws invalid as applied to cases of accident and injury occurring on navigable waters indicates that it has never been held that the question turns upon whether there has been a *tort* in the sense of an actionable wrong to the employee committed by the employer. In most, if not indeed in all, of those decisions there is nothing in the court's discussion of the facts or in the facts themselves to indicate that the employee had a valid claim for damages because of any actionable wrong on the part of the employer. See, for example,

Southern P. Co. v. *Jensen,* 244 U. S. 205;
Knickerbocker Ice Co. v. *Stewart,* 253 U. S. 149;
Employers' Liab. Ass. Corp. v. *Cook,* 281 U. S. 233;
Baizley Iron Works v. *Spun,* 281 U. S. 222;
London Guarantee & Acc. Co. v. *Ind. Acc. Com.,* 279 U. S. 109.

POINT V.

The subject matter of this case is not of purely local concern nor is it within the jurisdiction of the State of New York.

In the majority opinion below it was said (R., 57):

> "Even though the part of the contract of employment which brought about his presence on the boat be deemed to make the contract of employment maritime in its nature, the subject remains local in character and the applicability of the State compensation law quite possibly might be upheld in a Federal court under the exception to the general rule as to the applicability of maritime law which permits the application of

> a State statute where so doing will not 'work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations' (259 U. S. 263, 274)."

It is difficult to see how this suggestion may be reconciled with the decision of this court in the *Spencer Kellogg* case (285 U. S. 502). Here the subject is no more "local in character" than was the subject of that case, unless it be so merely because there the employees were being transported from their homes in New York to the employer's factory in New Jersey, while here no state line was to be crossed in the voyage from the mainland to Rikers Island. Other than this, there would seem to be no difference whatever in the nature of the subject of the two cases. As Chief Judge Crane said in the dissenting opinion in the court below (R., 65), that case was "similar in facts" and "exactly the same in principle".

And the subject matter of the case at bar is no more "local in character" than was the subject matter involved in *London Guar. & Acc. Co.* v. *Ind. Acc. Com.*, 279 U. S. 109.

As we have pointed out in Point III, this court has repeatedly held that admiralty jurisdiction in no wise depends upon whether the transportation is interstate in character. Since this is true, the case at bar is in this particular to be regarded as exactly the same in principle as the *Kellogg* case.

In no reported case has this court held, so far as the petitioners are aware, that injury to a passenger on board a vessel is a matter of mere local concern to which the local law is applicable.

This court recently held that a case of injury to a passenger was one of admiralty jurisdiction, even where the injury occurred, while disembarking, by falling from the end of a gangplank resting upon the dock. *Kenward* v. *The Admiral Peoples*, 295 U. S. 649.

And it has been held that accident and injury occurring in connection with the work of repair of a vessel is not a matter of purely local concern—even where the employer's business and plant were located on land and his only connection with the vessel was that he had contracted to make repairs to it.

Baizley Iron Works v. *Span*, 281 U. S. 222;
Messel v. *Foundation Co.*, 274 U. S. 427;
Robins, etc., Co. v. *Dahl*, 266 U. S. 449;
Gonsalves v. *Morse, etc., Co.*, 266 U. S. 171.

See also

Great Lakes, etc., Co. v. *Kierejewski*, 261 U. S. 479.

It has also been held that it is not a matter of importance that most of the employer's work and most of the work of the injured employee is done upon the land. Whenever an employer sends one of his employees upon a vessel and the injury occurs while at work there, admiralty has jurisdiction of the subject of the injury.

Northern Coal & Dock Co. v. *Strand*, 278 U. S. 142, 144.

In that case the employer, a wholesale coal dealer, owned or controlled no ships and, except that it owned a dock at which coal was delivered to it from ships, it had no connection with maritime affairs. The injured employee's regular work was non-maritime. He spent but two per cent. of his time unloading his employer's coal from ships. And yet this court held (p. 144):

"The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essen-

tial. The fact that Strand worked for the major portion of the time upon land is unimportant."

It is difficult to see how it may reasonably be contended that uniform rules are essential in respect of an employer's liability in cases of accident arising out of loading or unloading a vessel but are not essential in respect of such liability arising out of actual transportation by vessel.

Nothing to the contrary is to be deduced from the decision of this court in the case of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233. The ruling there was that the California Statute of Limitations, which was made a part of the California death statute, barred an action for the death of a longshoreman at work in the hold of a ship engaged in discharging cargo. The ruling of this court in that case was in substance that when admiralty thus borrows or adopts a state death statute, the time limitation on the right conferred by the statute must be applied—in other words, that the statute must be adopted or borrowed in its entirety—not merely a part of it.

The fact that the respective rights and liabilities of Heaney and the Carlin Company during the time that the former was being transported across the East River were different from their respective rights and liabilities when Heaney was engaged in bricklaying work on Rikers Island, constitutes no reason why the State compensation law should be applied to the present case. The same fact was present in all the cases in which this court has held the state law inapplicable to a case involving a maritime injury. In *Nogueira* v. *R. R. Co.*, 281 U. S. 128 (at p. 137), this court said, by Mr. Chief Justice Hughes:

"The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different

laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; * * *."

Nor does the fact (R., 43-45) that in obedience to the provisions of the New York Workmen's Compensation Law the Carlin Company had insured state workmen's compensation to its employees who might be injured in their work on Rikers Island, in any way alter the situation. The questions involved in this case would be the same even though the employer had secured no such insurance and even though New York had no workmen's compensation law. That an employer of workmen whose work is principally on land has rights under the maritime law which he does not surrender by insuring his employees under a State compensation law, even though it be elective in form, was held by this court in *Employers' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233. This court there said (at pp. 236, 237):

> "The fact that the Compensation Law of the state was elective in form does not aid the respondents. The employer did not surrender rights guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the state's control, either of which she had power to impose upon him."

In that case, while engaged in unloading a ship, the employee strained his back when lifting automobile parts. This work of unloading was apparently done only at rare intervals. The court said (p. 236):

> "Whether Cook's employment contemplated that he should work regularly in unloading vessels or only when specially directed so to do is not important. The

unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed the state lacked power to prescribe the rights and liabilities of the parties growing out of the accident."

The respondents may rely upon decisions of this court which permit the application of state compensation acts as against the admiralty law on the ground that they involve matter of local concern, but none of those cases seem to be relevant or controlling here because none of them involved transportation by vessel over navigable waters nor the rights of a passenger on such a vessel.

Among such cases are *Grant-Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Thames Towboat Co.* v. *The Schooner Francis McDonald,* 254 U. S. 242, both of which involved work in the construction of an uncompleted vessel, it being held that admiralty jurisdiction was not involved. The decision has been otherwise in the cases where repairs were being made to a completed vessel, it being held in such cases that the state compensation laws may not apply.

Messel v. *Foundation Co.,* 274 U. S. 427;
Baizley Iron Works v. *Span,* 281 U. S. 222;
Robins Dry Dock Repair Co. v. *Dahl,* 266 U. S. 449;
Great Lakes Dredge & Dock Co. v. *Kierejewski,* 261 U. S. 479.

These latter decisions show that the *Rohde* and *Thames Towboat Co.* cases have no value as authority in the instant case.

There are other cases held to present matters of local concern, in which the injury was sustained while at work in the construction or demolition of land structures extend-

ing into the water. In *Millers' Ind. Und.* v. *Braud,* 270 U. S. 59, the decedent was sawing off the timbers of an abandoned set of ways once used for launching ships, at his employer's ship yard. Although he had to submerge himself to do this, it was held to be a matter of local concern and compensable under the state law. Likewise, in *Lahti* v. *Terry & Tench Co., Inc.,* 240 N. Y. 292, reversed *sub. nom. State Industrial Board* v. *Terry & Tench Co., Inc.,* 273 U. S. 639, the workman was constructing a pier or dock, and, to do part of his work, was standing on a floating raft. Quite obviously in these cases there was no direct relation to navigation or commerce. So also in the two cases of *Sultan R. & Timber Co.* v. *Dept. of Labor and Industries* and *Eclipse Mill Co.* v. *Same,* 277 U. S. 135, the work involved was, in one case, assembling logs in booms for towing, and, in the other, taking the booms apart and guiding the logs to a conveyor extending into the river. It was said that if the work had a maritime character its relation to navigation and commerce was only incidental; and that local rules were applicable to it.

In other cases where state compensation laws have been upheld as valid and applicable the claimants sustained injuries while they were not upon a vessel in navigable waters. The admiralty law did not control in those cases because the injury was not of a maritime nature. Such were

Smith & Son v. *Taylor,* 276 U. S. 179;
State Ind. Com. v. *Nordenholt Corp.,* 259 U. S. 263;
Alaska Packers Asso. v. *Ind. Acc. Com.,* 276 U. S. 467.

The facts in *Rosengrant* v. *Havard,* 273 U. S. 664, are essentially different from those in the case at bar in that the injured employee there was not a passenger on a vessel, but merely went temporarily on board a schooner lying in

navigable waters near his employer's mill. His work consisted of checking a cargo of lumber. The lumber was not the cargo of the schooner on which he stood at the moment, but was being discharged from a barge lying nearby alongside the wharf. Apparently, he took this particular position merely because it was a convenient vantage point from which to observe the operations and pursue his checking work. Neither his employment nor his temporary presence on the schooner had any relation to navigation.

POINT VI.

This proceeding to recover compensation under the provisions of the New York Workmen's Compensation Law is not a common law remedy saved to suitors by Section 256 of the Judicial Code; U. S. C., Title 28, section 371.

"The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dict. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea." *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384.

"Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it'. The remedy which the Com-

pensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 218.

In *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 158, this court, referring to its prior decision in the *Jensen* case (*supra*), said:

> "We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the Compensation Law was unknown to the common law and incapable of enforcement by the ordinary processes of any court."

In *The Moses Taylor* v. *Hammons,* 71 U. S. (4 Wall.) 411, this court had pointed out that:

> "It is not a remedy in the common-law courts which is saved, but a common-law remedy."

POINT VII.

The provision of the New York Workmen's Compensation Law making it the exclusive source and measure of the employer's liability is an essential part of it; so that the whole statute is invalid and inapplicable as to a maritime injury, since this essential provision is beyond the power and jurisdiction of the State to make or to enforce.

The New York Workmen's Compensation Law provides (in section 11) that the liability of an employer therein described

> "shall be exclusive and in place of any other liability whatsoever * * * at common law or otherwise on account of such injury or death"

with the exception that if the employer "fail to secure the payment of compensation for his injured employees and their dependents" in one of the methods therein provided, there is given the right of election either to claim compensation under the statute or to maintain an action in the courts for damages; and further providing that

> "in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

If in any case like the present one the jurisdiction of a court of admiralty were properly invoked, either by employer or employee, the state law purporting and attempting to provide statutory compensation as the exclusive right and remedy would not be permitted to control the controversy and the state would be powerless to enforce this provision of its statute. But from the mere fact that the present rules of procedure in the Federal courts do not prescribe a remedy whereby, in a situation such as is here involved, an employer may initially and directly invoke admiralty jurisdiction by removal of the case to an admiralty court or by the institution there of a separate proceeding or suit in which the issues may be determined, it does not follow that the subject of the case is any the less one of admiralty jurisdiction.

If, then, the state statute would be unenforceable in a case wherein, by appropriate action under Federal procedure, either employee or employer had directly invoked the jurisdiction of a court of admiralty, the result must be the same here, the petitioners having invoked the admiralty jurisdiction of this court by availing themselves of appropriate procedure provided by the rules of this court to that end. The proceeding now before this court has afforded

the petitioners their first opportunity to bring this case before a Federal court of admiralty jurisdiction.

Of vital importance in the plan of workmen's compensation is the provision in section 11 that the act shall constitute the exclusive source and measure of the respective rights and liabilities of employee and employer. The employee is given no choice of rights or remedies (with certain exceptions not applicable to this case). This is an essential feature of the plan. The statute creates a new right in favor of the employee against his employer, together with a new remedy appropriate to its enforcement. But this is not all. It is only half of the plan. For the statute grants unto the employer immunity from any and all liability to the employee theretofore existing. In any case where this latter provision fails from lack of power in the state to make and enforce it, the statute must fail in its entirety. It is impossible of application with this essential feature eliminated, for such an application would be directly contrary to the fundamental purpose and aim of the whole plan.

POINT VIII.

The New York Workmen's Compensation Law, as applied to a maritime injury, is invalid

(A) In that it purports and attempts to work an assignment or transfer of the employee's cause of action against a negligent third person—a provision that is beyond the power of the state to make or to enforce; and

(B) In that it purports and attempts to impose upon a negligent third person, in certain circumstances, an added liability of a nature wholly foreign to and incompatible with the maritime law.

A.

Section 29 of the New York Workmen's Compensation Law provides in part as follows:

"If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation."

This fair and equitable provision of the compensation statute is a substantial part of its plan and purpose—to place where in justice and fairness it properly belongs the loss flowing from accidental injury, in all cases where the wrong-doer is not the employer but another not in his employ. So that, in a case of maritime injury, if an employer is to be compelled to pay compensation to his employee for injury caused by no act or wrong of his own, but by the wrong of another, not only is the employer deprived of his right of immunity under the maritime law, but in addition he is deprived of all right, even under the provisions of the state statute, to secure reimbursement from the wrong-doer. The anomalous result would of necessity be either to free the wrong-doer from any responsibility whatever to respond in damages to anyone (since by the terms of the statute the injured person is divested of his right to sue for damages), or else (if that provision should be held to be ineffective), the employee would be able to secure a double recovery, i. e., statutory compensation from his employer and, in addition, full compensatory damages from the third person liable to him under the principles of the maritime law.

Chief Judge Crane, in the minority opinion below, said (R., 63-65):

"What is the effect of our Workmen's Compensation Law upon the remedy in admiralty? By section 29 of

our Workmen's Compensation Law when the employee accepts compensation his cause of action is assigned to the insurance carrier. This is a modification of all rights existing at common law. No tort action could be assigned. But we go further, for the cause of action which passes to the insurance company is prosecuted not on the basis of subrogation solely, but for the benefit of the insurance carrier. (*Tracy* v. *American Mutual Liability Ins. Co.*, 266 N. Y. 536, decided January 24, 1935; cf. *Zurich G. A. & L. Ins. Co.* v. *Childs Co.*, 253 N. Y. 324, 329; *Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273.)"

* * * * * *

"The very nature of the remedy provided by this State legislation shows on its face that it seeks to supplement or add to the admiralty law when a cause of action assigned to an insurance carrier is attempted to be prosecuted in admiralty. In *Travelers Ins. Co.* v. *Prince Line, Ltd.* (262 Fed. Rep. 841), a District Court decision, Mayer, J., held that admiralty would not recognize the assignability of a tort action, and that our Workmen's Compensation Law did not apply to admiralty torts. In *Knickerbocker Ice Co.* v. *Stewart* (253 U. S. 149) it was held that the provisions of section 9 of the Judiciary Act of 1789 granting to the United States District Courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, referred to remedies for the enforcement of the Federal maritime law. It conferred no substantive rights and did not authorize the States so to do. Our Workmen's Compensation Law does confer substantive rights. It gives to the insurance carrier a right to recover full damages when it has only paid out part, and also to recover on an entirely new cause of action for moneys contributed to State funds."

It is submitted that what was said, in this connection, in the majority opinion of the court below (R., 60, 61), does not reach the point. It was there pointed out that the statute does not guarantee reimbursement to the employer where the injury has been caused by the negligence of a third person. No one will dispute that proposition. It is likewise true, as there suggested, that the wrong-doer may be financially irresponsible, or there may be inability to prove a valid cause of action against him. But all of this misses the point completely; the point being that since this purported or attempted transfer, by virtue of the state statute, of the employee's right under the maritime law is ineffectual because beyond the jurisdiction and power of the state, it must follow that the whole subject of an employee's injuries suffered in a maritime disaster is beyond the jurisdiction of the state for the identical reason.

B.

Section 29 of the New York Workmen's Compensation Law provides that in certain circumstances a compensation insurance carrier shall have the right to recover from a negligent third person an amount that it has paid into the New York insurance fund and that this cause of action "shall be in addition to any cause of action by the legal representative of the deceased", the provision applying only to cases wherein the injuries have been fatal.

Section 29 also provides that in addition to the cause of action that falls to the legal representatives of persons so killed, the insurance carrier shall have a cause of action against the negligent third party to recover medical expenses and funeral expenses.

Section 29 also lays its hand upon the third party and restrains him in his activities by its provision that he may not compromise any cause of action with the employee or his dependents at an amount less than the compensation provided by the statute, except with the written approval of the person liable to pay compensation.

Section 13 grants to the employer or his insurance carrier a cause of action against a negligent third person for medical expenses incurred prior to the time when the employee elects to sue the third person, even though no award of compensation is ever asked or granted.

Surely no one may reasonably urge that, in a case of maritime injury, these provisions of the state law would not work material injury to the characteristic features of the maritime law and destroy its uniformity. To suggest that these provisions are effective in a case of maritime injury would be not only to deny the exclusiveness of Federal jurisdiction but to urge that, in case of conflict, the state law is paramount.

IN CONCLUSION.

The impracticability of an attempt to apply the state statute equitably and consistently to cases of maritime injury is apparent from the results which of necessity would follow:

1. In all cases where the employee (but for the provisions of the state statute) has, or would have, a valid cause of action under the maritime law against the employer for the recovery of full damages, the employee would be deprived of that right. The local statute would substitute another and different right and remedy, unknown to the maritime law, thereby ousting the Federal government of jurisdiction to fix and determine the employee's rights and remedies.

2. If ultimately it should be decided that in such circumstances the result above indicated should not and would not be permitted, the alternative would be to grant to the injured employee the right to elect to take compensation under the state statute or to sue the employer for damages under the principles of the maritime law. Such a ruling would do violence not only to the maritime law but to the state statute as well; for the latter (with certain limited

exceptions) gives no right of election, but on the contrary declares (Section 11) that the liability thereby prescribed

> "shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law, or otherwise, on account of such injury or death."

3. In all cases where the maritime law imposes no liability upon the employer, the latter would be deprived of his right of immunity under that law.

4. In all cases where the injury was caused by the wrongful act of another, one of three results must follow:

(a) The wrongdoer would gain complete immunity;

(b) The employee would have a double recovery for the same injury; or

(c) Courts of admiralty would be compelled to recognize and enforce the provisions of the local statute (Section 29) governing the transfer to the employer or his insurance carrier of the employee's maritime cause of action against the wrongdoer—which would work a substantial modification of the maritime law and destroy its uniformity.

5. In cases of death, the employer would, in certain circumstances, be compelled to pay $1,000 to the state (Section 15, subds. 8 and 9, N. Y. Workmen's Compensation Law); and the payment thus made would not inure to the benefit of the deceased employee's estate or of his next of kin. And in case of such payment,

(a) Either the provision of the New York statute (Section 29) granting the employer the right of reimbursement for such payment from a negligent third person must be declared invalid for want

of power of the state so to modify the maritime law, or

(b) The maritime law would have to be deemed modified accordingly, by the state statute, to the destruction of its uniformity. (In some cases, the wrong-doer would be subjected to liability for this sum in addition to a recovery of full damages by the next of kin of the deceased employee who are not included as beneficiaries, within the provisions of the compensation statute. See *Phoenix Ind. Co.* v. *S. I. R. T. Ry. Co.*, 251 N. Y. 127.)

The solution of all these questions manifestly lies with the Congress of the United States, which has the power and the right to regulate the whole subject of the rights and liabilities of all the parties concerned. If Congress should consider that a right and remedy of statutory compensation ought to be given the employee in such a case as this, and that a corresponding burden ought to be placed upon the employer, it has the power to amend the maritime law accordingly and to make suitable provisions by which may be avoided the anomalous results to which attention has been hereinabove directed.

POINT IX.

The judgment below should be reversed, with costs, and the cause remanded, with instructions that Heaney's claim under the New York Workmen's Compensation Law be dismissed.

Respectfully submitted,

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Counsel for petitioners.

APPENDIX.

Summary of the Workmen's Compensation Law of New York, Text of the Same Statute and Index to the Text.

Summary.

We here summarize the Workmen's Compensation Law of the State of New York, which, so far as the issues in this action are concerned, is substantially unchanged from what it was when this court had it up for consideration in 1916, in *New York Central Railroad Company* v. *White*, 243 U. S. 188, and, in 1917, in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

The text of the statute and an index thereto follow this summary.

The statute establishes nineteen groups of hazardous employments, one group containing more than two hundred and fifty items and other groups varying in the number of items (Section 3); defines "employee" as a person engaged in one of those hazardous employments or who is in the service of an employer whose principal business is that of carrying on such employment, excluding farm laborers and domestic servants (Section 2, subd. 4); defines "employment" as including only employment in a trade, business or occupation carried on by the employer for pecuniary gain, except where the employer and his employees have jointly elected to become subject to the act (Section 2, subd. 5); "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment and such disease or infection as naturally and unavoidably may result therefrom (Section 2, subd. 7); includes specified occupational diseases under substantially the same terms as accidental injuries (Sections 37-48); requires every employer subject to its pro-

visions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from intoxication of the injured employee while on duty, in which case neither the injured employee nor any dependent shall receive compensation (Section 10).

By Section 11 the prescribed liability is made exclusive, except that, if an employer fails to secure the payment of compensation as provided in Section 50, an injured employee, or his legal representative, in case death results from the injury, may elect to claim compensation under the act, or to maintain an action in the courts for damages, in which action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence.

Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing medical, surgical, or other like treatment (Section 13), it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent (Sections 14, 15); in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding $200.00, payment to the surviving wife (or dependent husband) during widowhood, or dependent's widowerhood, of a percentage of the aver-

age wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached (Section 16).

There are provisions invalidating agreements by employees to waive the right of compensation (Section 32), prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act (Section 33), exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents (Section 33).

Provision is made for the appointment of an industrial commissioner and an industrial board with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested (Sections 20, 22, 25). The award or decision of the industrial board is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil actions (Section 23). A fund is created known as "The State Insurance Fund," for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided (Sections 90-106). The fund is made up primarily of premiums received from employers, at rates fixed by the commissioner in view of the hazards of the different classes of employments, and the premiums are to be based upon the total payroll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve, and elaborate provisions are laid down for the administration of this fund (Sections 90-99).

By Section 50, each employer is required to secure compensation to his employees in one of the following ways:

(1) By insuring and keeping insured the payment of such compensation in the State Fund; or (2), through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) by furnishing satisfactory proof to the commissioner of his financial ability to pay such compensation for himself and making the deposit of required securities to secure such payment. If an employer fails to comply with this section, he is guilty of a misdemeanor, punishable by fine or imprisonment, or both (Section 52); besides which, the injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by Section 11.

Section 29 provides that if an employee entitled to compensation be injured or killed by the negligence or wrong of another not in the same employ he or his dependents shall elect whether to take compensation or to pursue the remedy against such other, and that if compensation is elected, the awarding of compensation shall operate as an assignment of the cause of action to the person paying compensation, and if the election is to proceed against the third party, the insurance carrier shall contribute only the deficiency between the amount of the recovery against such third party and the compensation provided by the compensation law.

Section 29 also provides for the case of an award to the state treasurer in accordance with subdivision 8 of Section 15 (which section establishes a fund to care for the special cases of employees who had previously incurred partial disability through the loss of a member and later incur total disability through the loss of another member, such fund to be made up by assessing $500.00 against the employer or insurance carrier for every case of injury causing death at which there are no persons entitled to compensation), and for the case of an award

to the state treasurer in accordance with subdivision 9 of Section 15 (which section creates a fund for vocational rehabilitation and assesses a similar amount in every case in which there is no person entitled to compensation). In case of the payment of an award under either of these subdivisions, such payment operates to give to the employer or insurance carrier a cause of action for the amount of such payment against the third party negligently or wrongfully causing the injury, together with the reasonable funeral expenses and the expense of medical treatment, all of which shall be in addition to any cause of action by the legal representatives of the deceased.

Section 29 provides that a compromise of any such cause of action by the employee or his dependent at an amount less than the compensation provided for by the law shall be made only with the written approval of the person liable to pay the compensation.

Section 25 provides that in case of the failure of an insurance carrier to pay any instalments of compensation within eighteen days after it shall become due, there shall be an added amount due by way of penalty of ten per centum of the compensation then due, and, further, that if an insurance carrier shall fail to make any payments within ten days after it is awarded, there shall be imposed a penalty equal to twenty per centum of the compensation, and that an employer or insurance carrier who fails to notify the commissioner that payments have stopped shall be subjected to a penalty imposed by the commissioner, and in an amount not exceeding $25.00.

Section 110 declares an employer who refuses or neglects to report an injury within ten days to be guilty of a misdemeanor punishable by a fine of not more than $500.00.

THE WORKMEN'S COMPENSATION LAW OF NEW YORK.

Chapter 816 of the Laws of 1913, as Amended and Re-enacted by Chapter 41 of the Laws of 1914, Constituting Chapter 67 of the Consolidated Laws, as Amended to September 9, 1932.

(Abbreviated in Particulars That Cannot Be Deemed Relevant to This Case, All Instances of Such Abbreviation Being Indicated in the Places Where They Occur.)

ARTICLE 1.

Section 1. Short title.—This chapter shall be known as the "workmen's compensation law."

§ 2. **Definitions.**—As used in this chapter:

1. "**Hazardous employment**" means a work or occupation described in section three of this chapter.

2. "**Department**" means the department of labor of the state of New York.

"**Commissioner**" means the industrial commissioner of the state of New York.

"**Board**" means the industrial board of the state of New York.

3. "**Employer,**" except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof.

4. "**Employee**" means a person engaged in one of the occupations enumerated in section three or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon

the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.

5. "**Employment**" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, except where the employer and his employees have by their joint election elected to become subject to the provisions of this chapter as provided in section three.

6. "**Compensation**" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

7. "**Injury**" and "**personal injury**" means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

8. "**Death**" when mentioned as a basis for the right to compensation means only death resulting from such injury.

9. "**Wages**" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.

10.—"**State fund**" means the state insurance fund provided for in article five of this chapter.

11. "**Child**" shall include a posthumous child, a child legally adopted prior to the injury of the employee; and a step-child or acknowledged illegitimate child dependent upon the deceased.

12. "**Insurance carrier**" shall include the state fund, stock corporations or mutual associations with which em-

ployers have insured, and employers permitted to pay compensation directly under the provisions of subdivisions three or four of section fifty.

13. **"Manufacture," "construction," "operation" and "installation"** shall include "repair," "demolition," "fabrication" and "alteration" and shall include all work done in connection with the repair of plants, buildings, grounds and approaches of all places where any of the hazardous employments are being carried on, operated or conducted.

§ 3. **Application.—1. Hazardous employments.** Compensation shall be payable for injuries or death incurred by employees in the following employments:

Group 1. Canning of: Fish, Foodstuffs, Fruit, Vegetables. **Group 2.** Care of: Buildings, Grounds, Trees. **Group 3.** Construction of: Bridges, Buildings (and 23 other items). **Group 4.** Installation of: Boilers, Dynamos (and 9 other items). **Group 5.** Laying of: Cables, Pipes, Tiles Wires. **Group 6.** Manufacture of: Acids, Adding Machines (and 249 other items). **Group 7.** Operation of: Barges, Boats, Lighters, Ships, Transports, Tugboats, Vessels (and 36 other items). **Group 8.** Preparation of: Fish, Foodstuffs (and 9 other items). **Group 9.** Removal of: Ashes, Awnings, Garbage, Snow. **Group 10:** Sinking of: Drilled Wells (and 3 other items). **Group 11.** Storage or handling of: Cargoes (and 8 other items). **Group 12.** Work as: Longshoreman (and 23 other items). **Group 13.** Work at: Dredging, marine wrecking (and 72 other items). **Group 14.** Work in: Abattoirs, Bakeries (and 56 other items). **Group 15.** Employment as a keeper, guard, nurse or orderly in a prison, reformatory, insane asylum or hospital maintained or operated by a municipal corporation or other subdivision of the state, notwithstanding the definitions of the terms "employment," "employer" or "employee" in subdivisions three, four and five of section two of this chapter.

Group 16. Any employment by the state, notwithstanding the definitions of the terms "employment," "employer" or "employee" in subdivisions three, four and five of section two of this chapter.

Group 17. Any employment enumerated in the foregoing groups and carried on by a municipal corporation or other subdivision of the state, notwithstanding the definition of the term "employment" in subdivision five of section two of this chapter.

Group 18. All other employments, except persons engaged in a clerical, teaching or non-manual capacity in or for a religious, charitable or educational institution, notwithstanding the definition of employment in subdivision five of section two, not hereinbefore enumerated, carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers, domestic servants, other than private or domestic chauffeurs employed as such in cities of two million inhabitants or over, and persons engaged in voluntary service not under contract of hire. A minister, priest or rabbi, or a member of a religious order, shall not be deemed to be employed or engaged in employment under the terms of this section.

Group 18. All other employments, except persons engaged in a clerical, teaching or non-manual capacity in or for a religious, charitable or educational institution, notwithstanding the definition of employment in subdivision five of section two, not hereinbefore enumerated, carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same

establishment either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers, domestic servants, other than private or domestic chauffeurs employed as such in cities of two million inhabitants or over, and persons engaged in voluntary service not under contract for hire. A minister, priest or rabbi, or a member of a religious order, shall not be deemed to be employed or engaged in employment under the terms of this section. All persons employed, either by direct employment or by contract, in logging or wood cutting operations, conducted by a farmer on his own farm, consisting of felling timber, cutting it into dimension lengths and taking it to market or to a point for shipment or transportation, shall not be deemed to be employed or engaged in employment under the terms of this section, provided not more than four persons are so employed by such farmer at one time, and provided further that this exemption shall not extend to the sawing of such timber or wood into lumber.

Group 19. An employer may bring an employment that is not listed in this section within the coverage of this chapter by securing compensation to his employee or employees engaged in such employment in accordance with section fifty of this chapter.

(Here follow provisions making it optional for employees to be covered by the statute under such circumstances.)

ARTICLE 2.

Compensation.

§ 10. Liability for Compensation.—Every employer subject to this chapter shall in accordance with this chapter secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment, without regard to fault as a cause of the injury, except that

there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication of the injured employee while on duty or by willful intention of the injured employee to bring about the injury or death of himself or another.

§ 11. **Alternative remedy.**—The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

§ 12. **Compensation not allowed for first seven days.**—No compensation shall be allowed for the first seven days of disability, except the benefits provided for in section thirteen of this chapter, provided, however, that in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

§ 13. **Treatment and care of injured employees.**—The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and appara-

tus for such period as the nature of the injury or the process of recovery may require. If the employer fail to provide the same, after request by the injured employee such injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same; nor shall any claim for medical or surgical treatment be valid and enforceable, as against such employer, unless within twenty days following the first treatment, the physician giving such treatment, furnish to the employer and the industrial commissioner a report of such injury and treatment, on a form prescribed by the industrial commissioner. The board may, however, by the unanimous vote of all the qualified members, excuse the failure to give such notice within twenty days when it find it to be in the interest of justice to do so, and may, subject to the limitations contained in section twenty-eight of this chapter, make an award for the reasonable value of such medical or surgical treatment. All fees and other charges for such treatment and services, whether furnished by the employer or otherwise, shall be subject to regulation by the board as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The liability of an employer for medical treatment as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party, not in the same employ, unless and until notice of election to sue or the bringing of suit against such third party. The employer shall, however, have an

additional cause of action against such third party to recover any amounts paid by him for such medical treatment, in like manner as provided in section twenty-nine of this chapter.

§ 14. Weekly wages basis of compensation.—Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:

(Here follow several methods of computing the weekly wage under various conditions.)

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

5. If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wages.

§ 14a. Double compensation and death benefits for minors illegally employed.—(This section provides that double the regular compensation shall be paid if the injured person is a minor whose employment is forbidden by the Labor Law of the state.)

§ 15. Schedule in case of disability.—The following schedule of compensation is hereby established:

1. Permanent total disability. In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or

both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. **Temporary total disability.** In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of five thousand dollars, except as otherwise provided in this chapter.

3. **Permanent partial disability.** In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in this subdivision, as follows:

Member lost	Number of weeks' compensation	Member lost	Number of weeks' compensation
a. Arm	312	h. Great toe	38
b. Leg	288	i. Second finger	30
c. Hand	244	j. Third finger	25
d. Foot	205	k. Toe other than great toe	16
e. Eye	160	l. Fourth finger	15
f. Thumb	75		
g. First finger	46		

m. **Loss of hearing.** Compensation for the complete loss of the hearing of one ear, for sixty weeks; for the loss of hearing of both ears, for one hundred and fifty weeks.

n. **Phalanges.** Compensation for the loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

o. **Amputated arm or leg.** Compensation for an arm or a leg, if amputated at or above the wrist or ankle, shall be for the proportionate loss of the arm or leg.

p. **Binocular vision or per centum of vision.** Compensation for loss of binocular vision or for eighty per centum or more of the vision of an eye shall be the same as for loss of the eye.

q. **Two or more digits.** Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby but shall not exceed the compensation for loss of a hand or foot.

r. **Total loss of use.** Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

s. **Partial loss or partial loss of use.** Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of that member.

t. **Disfigurement.** (This subdivision authorizes awards for disfigurement.)

u. **Total or partial loss or loss of use of more than one member or parts of members.** In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs a to t, both inclusive, of this subdivision, but not amounting to permanent total disability, the board shall award compensation for the loss or loss of use of each such member or part thereof, which awards shall run consecutively.

v. **Other cases.** In all other cases in this class of disability the compensation shall be sixty-six and two-thirds

per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the board on its own motion or upon application of any party in interest.

4. **Effect of award.** (This subdivision provides that an award made to a claimant shall in case of his death be payable to his widow or children or other dependent, and that an award for disability may be made after the death of an injured employee.)

4-a. **Protracted temporary total disability in connection with permanent partial disability.** (This paragraph provides for compensation for total disability under certain circumstances, in addition to that prescribed for loss of a member.)

5. **Temporary partial disability.** In case of temporary partial disability resulting in decrease of earning capacity, the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the accident and his wage earning capacity after the accident in the same or another employment but shall not exceed in total four thousand dollars.

5-a. **Determination of wage earning capacity.** The wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earnings, provided, however, that if he has no such actual earnings the industrial board may in the interest of justice fix such wage earning capacity as shall be reasonable, but not in excess of seventy-five per centum of his former full time actual earnings, having due regard to the nature of his injury and his physical impairment.

6. Maximum and minimum compensation for disability. Compensation for permanent or temporary partial disability shall not exceed twenty dollars per week nor be less than eight dollars per week; compensation for permanent or temporary total disability shall not exceed twenty-five dollars per week; nor less than eight dollars per week; provided, however, that if the employee's wages at the time of injury are less than eight dollars per week, he shall receive his full weekly wages; further provided, that in case of permanent total disability caused by loss of both eyes, minimum compensation shall not be less than fifteen dollars per week.

6-a. Reclassification of disabilities. The board may, within three years from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice.

7. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

8. Permanent total disability after permanent partial disability.—If an employee who has previously incurred

permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The employer, or if insured, his insurance carrier, shall pay into such special fund for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The commissioner of taxation and finance shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

9. **Expenses for rehabilitating injured employees.**—An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which

there are no persons entitled to compensation the sum of five hundred dollars. The commissioner of taxation and finance shall be the custodian of this special fund and may invest any surplus moneys thereof in securities which constitute legal investments for savings banks under the laws of this state. He may also sell any of the securities in which such fund is invested if necessary for the proper administration or in the best interests of such fund.

Disbursements from the vocational rehabilitation fund for the additional compensation provided for by this section shall be paid by the commissioner of taxation and finance upon vouchers signed by the industrial commissioner or deputy industrial commissioner.

Disbursements from the vocational rehabilitation fund for administrative expenses of the state department of education shall be paid by the commissioner of taxation and finance upon vouchers signed by the commissioner of education or the deputy commissioner of education.

Prior to the first days of January, April, July and October there shall be submitted to the governor by the commissioner of education for its approval an estimated budget of administrative expenses of the state department of education which it is proposed to charge to the vocational rehabilitation fund for the succeeding three months. There may not be expended from the said fund for such administrative expenses, more than the amounts specified in such budget for each item of expenditure, except as authorized by the board of estimate and control.

§ 16. **Death benefits.**—If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(Here follow detailed requirements as to payment of funeral expenses and of death benefits, which differ from such requirements at common law and under all other statutes of New York.)

5. **Any excess of wages** over one hundred and fifty dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

6. (This paragraph deals with the recipients of compensation who are inmates of public charitable institutions.)

§ 17. **Aliens.**—Compensation under this chapter to aliens not residents (or about to become non-residents) of the United States or Canada, shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or, if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident, and except that the commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission.

§ 18. **Notice of injury or death.** (Here follow provisions requiring persons entitled to compensation to give employers notice of injury, specifying how and when the notice must be given and the effect of a failure to give such notice.)

§ 19. **Physical examination.** (Sections 19, 19-a and 19-b deal with physical examinations of injured employees.)

§ 20. **Determination of claims for compensation.**—At any time after the expiration of the first seven days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer or to the commissioner. The board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The commissioner or board shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the department. Immediately after such filing the commissioner shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the board shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. All awards of the board shall draw interest from thirty days after the making thereof. Whenever a hearing or proceeding for the determination of a claim for compensation is begun before a referee, pursuant to the provisions of this chapter or of section nineteen of the labor law, such hearing or proceeding or any adjourned hearing thereon shall continue before the same referee until a final determination awarding or denying compensation, except in the absence, inability or disqualification to act of such referee, or for other good cause, in which event such hearing or proceeding may be continued before another referee by order of the commissioner or board.

§ 21. **Presumptions.**—In any proceeding for the enforcement of a claim for compensation under this chapter,

it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provision of this chapter.

2. That sufficient notice thereof was given.

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another.

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

5. That the contents of verified medical and surgical reports introduced in evidence by claimants for compensation shall constitute prima facie evidence of fact as to the matter contained therein.

§ 22. **Modification of award.** Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions or proof of erroneous wage rate, the board may at any time review any award, decision or order and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid, except that an award increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased

rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the board.

§ 23. **Appeals.**—An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided. Within thirty days after notice of the filing of the award or the decision of the board has been sent to the parties an appeal may be taken to the appellate division of the supreme court, third department, from such award or decision by any party in interest including an employer insured in the state fund; but if any party shall within twenty days after notice of the filing of such award or decision, make an application in writing to the board for a modification or rescission or review of such award or decision of a referee, as provided in section nineteen of the labor law, an appeal may thereafter be taken to the appellate division of the supreme court, third department, from such award or decision by any party in interest within twenty days after notice of the filing of the decision of the board upon such application. If notice of such appeal is served upon the board, the board shall within thirty days thereafter serve upon the parties in interest and file its findings of fact and rulings of law in such case. The board may also, in its discretion certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The board shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the board thereon. An appeal may also be taken to the court of appeals in all cases where the decision of the appellate

division is not unanimous and by the consent of the appellate division or the court of appeals where the decision of the appellate division is unanimous in the same manner and subject to the same limitations not inconsistent herewith as is now provided in civil actions. It shall not be necessary to file exceptions to the rulings of the board. Neither the commissioner, the board nor the claimant shall be required to file a bond upon an appeal to the court of appeals. Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon final determination of such an appeal, the board shall enter an order in accordance therewith. Whenever a notice of appeal is served or an application made to the board by the employer or insurance carrier for a modification or rescission or review of an award or decision, and the board shall find that such notice of appeal was served or such application made for the purpose of delay or upon frivolous grounds, the board may in its discretion impose a penalty in an amount not exceeding twenty-five dollars upon the employer or insurance carrier, which penalty shall be added to the compensation and paid to the claimant. The penalties provided herein shall be collected in like manner as compensation. A party against whom an award of compensation shall be made may appeal from a part of such award. In such a case the payment of such part of the award as is not appealed from shall not prejudice any rights of such party on appeal, nor be taken as an admission against him.

§ 24. Costs and fees.—If the board or the court before which any proceedings for compensation or concerning an award of compensation have been brought, under this chapter, determine that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought them. Claims of attorneys and counselors-at-

law for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the board. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the board. Any other person, firm or corporation who shall exact or receive fee or gratuity for any services, rendered on behalf of a claimant except in an amount determined by the board, shall be guilty of a misdemeanor. Any person, firm or corporation who shall solicit the business of appearing before the board on behalf of a claimant, or who shall make it a business to solicit employment for a lawyer in connection with any claim for compensation under this chapter shall be guilty of a misdemeanor. In case an award is affirmed upon an appeal to the appellate division, the same shall be payable with interest thereon from the date when said award was made by the board.

§ 24-a. Representation before the industrial board. (This section provides for the licensing of persons other than attorneys at law to appear before the industrial board on behalf of parties.)

§ 25. Compensation, how payable.—The compensation herein provided for shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto without waiting for an award by the industrial board, except in those cases in which the right to compensation is controverted by the employer. The first payment of compensation shall become due on the fourteenth day of disability on which date or within four days thereafter all compensation then due shall be paid, and the compensation payable bi-weekly

thereafter; but the industrial board may determine that any payments may be made monthly or at any other period, as it may deem advisable. If the employer or insurance carrier does not controvert the injured workman's right to compensation such employer or insurance carrier shall, either on or before the eighteenth day after disability, or within eight days after the employer first has knowledge of the alleged accident, begin paying compensation and shall immediately notify the commissioner in accordance with a form to be prescribed by him, that the payment of compensation has begun, accompanied by the further statement that the employer or insurance carrier, as the case may be, will notify the commissioner when the payment of compensation has been stopped. Immediately upon the stoppage or suspension of payments of compensation the employer or insurance carrier shall notify the commissioner of such act on a form to be prescribed by him. In case the employer decides to controvert the right to compensation he shall, either on or before the eighteenth day of disability or within ten days after he has knowledge of the alleged accident, file a notice with the commissioner, on a form prescribed by him, that compensation is not being paid, giving the name of the claimant, name of the employer, date of the alleged accident and the reason why compensation is not being paid. The commissioner may in the interest of justice at any time refer a case in which payments are being made as above to the industrial board for a hearing, and shall immediately upon receipt of notice from the injured workman, from the employer, or from the insurance carrier that the employee's right to compensation is controverted, or that payments of compensation have stopped or been suspended, make such investigations, or cause such medical examinations to be made, or refer the case for such hearings, as will properly protect the rights of both parties, either as to any compensation then due or

as to any compensation that may become due in the future for temporary or permanent disability, and shall promptly cause the resumption of payments in case the injured person is entitled thereto. If the employer or insurance carrier shall fail to pay any instalments of compensation within eighteen days after the same becomes due, there shall be paid by the employer or, if insured, his insurance carrier, an additional amount of ten per centum of the compensation then due which shall accrue for the benefit of the injured workman or his dependents and shall be paid to him or them with the compensation, unless such delay or default is excused by the industrial board upon the application of the employer or insurance carrier upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made. Nothing herein shall limit the right of the industrial board in a particular case to hold a hearing and make an award in accordance with other provisions of this chapter. No case shall be closed without notice to all parties interested and without giving to all such parties an opportunity to be heard. If the employer has made advance payments of compensation, or has made payments to an employee in like manner as wages during any period of disability, he shall be entitled to be reimbursed out of an unpaid instalment or instalments of compensation due, provided his claim for reimbursement is filed before compensation is paid, or, if insured, by the insurance carrier at the direction of the industrial board, unless he shall file a waiver of reimbursement with the commissioner, in which event compensation shall be paid to the claimant notwithstanding the advanced payments. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the commissioner, whenever required. If the employer

or his insurance carrier shall fail to make payments of compensation according to the terms of the award within ten days thereafter, except in case of an appeal, there shall be imposed a penalty equal to twenty per centum of the unpaid compensation which shall accrue to the benefit of the injured workman or his dependents and shall be paid to him or them.

Whenever for any reason compensation payments cease, the employer or his insurance carrier shall within sixteen days thereafter, send to the commissioner a notice on a form prescribed by the commissioner that such payment has been stopped, which notice shall contain the name of the injured employee or his principal dependent, the date of accident, the date to which compensation has been paid and the whole amount of compensation paid, and in case the employer or his insurance carrier fail so to notify the commissioner of the cessation of payments within sixteen days after the date on which compensation has been paid, the commissioner may, after a hearing, impose a penalty upon such employer or his insurance carrier in an amount in his discretion not exceeding twenty-five dollars, one-half of which shall be paid into the special fund created under favor of numbered paragraph eight of section fifteen herein and one-half of which shall be paid into the state treasury and be applicable to the expenses of the department. Such penalty shall be collected in like manner as an award of compensation. Whenever the commissioner may deem it advisable he may require any employer or insurance carrier to make a deposit with the commissioner to secure the prompt and convenient payment of such compensation, and the commissioner shall have power to make payments therefrom upon any awards.

The industrial board, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be

in the interests of justice. Such commutation shall be made according to the method prescribed in section twenty-seven of this chapter.

§ 26. Enforcement of payment in default.—In case of default by the employer in the payment of any compensation due under an award for the period of thirty days after payment is due and payable, or, where the employer has failed to secure the payment of compensation to his employees as required by section fifty hereof where there is such default in payment for a period of ten days after same is due, any party in interest may file with the county clerk for the county in which the injury occurred or the county in which the employer has his principal place of business, a certified copy of the decision of the state industrial board awarding compensation or ending, diminishing or increasing compensation previously awarded, from which no appeal has been taken within the time allowed therefor, or if an appeal has been taken by an employer who has not complied with the provisions of section fifty hereof, where he fails to deposit with the commissioner the amount of the award as security for its payment within ten days after same is due and payable, and thereupon judgment must be entered in the supreme court by the clerk of such county in conformity therewith immediately upon the filing of such decision. If the payment in default be an instalment, the commissioner may declare the entire award due and judgment may be entered in accordance with the provisions of this section. Such judgment shall be entered in the same manner, have the same effect and be subject to the same proceedings as though rendered in a suit duly heard and determined by the supreme court, except that no appeal may be taken therefrom. The court shall vacate or modify such judgment to conform to any later award or decision of the board upon presentation of a certified copy of

such award or decision. The award may be so compromised by the board as in the discretion of the board may best serve the interest of the persons entitled to receive the compensation or benefits. Neither the commissioner nor any party in interest shall be required to pay any fee to any public officer for filing or recording any paper or instrument or for issuing a transcript of any judgment executed in pursuance of this section.

§ 27. **Depositing future payments.**—If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the board may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the board may deem necessary for a proportionate payment of expenses of administering the fund so created. The moneys so paid in for all death benefits or other compensation to constitute one aggregate and indivisible fund; and thereupon such employer or insurance carrier shall be discharged from any further liability under such award and payment of the same as provided by this chapter shall be assumed by the special fund so created. All computations made by the board shall be upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum.

Such special fund shall be kept separate and apart from all other moneys of the state fund, and shall not be liable for any losses or expenses of administration of the state

fund other than the expenses involved in the administration of such special fund, nor shall the state fund be charged with the losses or expenses of the aggregate special fund beyond the amount of such special fund.

Any portion of such special fund may be invested by the commissioner, with the approval of the superintendent of insurance, in the same securities as provided in this chapter for the investment of the state insurance fund.

§ 28. **Limitation of right to compensation.**—The right to claim compensation under this chapter shall be barred, except as hereinafter provided, unless within one year after the accident, or if death results therefrom, within one year after such death, a claim for compensation shall be filed with the commissioner, but the employer and insurance carrier shall be deemed to have waived the bar of the statute unless the objection to the failure to file the claim within one year is raised on the first hearing on such claim at which all parties in interest are present. No case in which an advance payment is made to an employee or to his dependents in case of death shall be barred by the failure of the employee or his dependents to file a claim, and the board may at any time order a hearing on any such case in the same manner as though a claim for compensation had been filed. The board may, however, by unanimous vote of the members qualified to act, permit the filing of a claim for compensation after the expiration of one year from the date of accident or death, but not exceeding two years after the date of such accident or death, when it shall find that such filing shall be in the interest of justice; and may order a hearing and make such award or decision on such claim as though the claim for compensation had been filed within the time prescribed in this section.

§ 29. **Subrogation to remedies of employees.**—If an employee entitled to compensation under this chapter be in-

jured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. Such a cause of action assigned to the state may be prosecuted or compromised by the commissioner. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commissioner, if the deficiency of compensation would be payable from the state insurance fund, and otherwise

with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the board may determine in each case.

§ 30. **Revenues or benefits from other sources not to affect compensation.**—No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered; in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system which is not sustained in whole or in part by the contributions of the employee, may be applied toward the payment of the death benefit provided by this chapter.

§ 31. **Agreement for contribution by employee void.**—No agreement by an employee to pay any portion of the premium paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor.

§ 32. **Waiver agreements void.**—No agreement by an employee to waive his right to compensation under this chapter shall be valid.

§ 33. **Assignments; exemptions.**—Compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents. In case of the death of an injured employee to whom there was due at the time of his, or her death any compensation under the provisions of this chapter, the amount of such compensation shall be payable to the surviving wife or husband, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving wife or children, then to the dependents of such deceased employee or to any of them as the commission may direct. An award for disability may be made after the death of the injured employee.

§ 34. **Preferences.**—Compensation shall have the same preference or lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise.

ARTICLE 3.

Occupational Diseases.

§ 37. **Definitions.**—Whenever used in this article:

1. "**Disability**" means the state of being disabled from earning full wages at the work at which the employee was last employed.

2. **"Disablement"** means the act of becoming so disabled as defined in subdivision one.

§ 38. **Disablement treated as accident.**—The disablement of an employee resulting from an occupational disease described in subdivision two of section three shall be treated as the happening of an accident within the meaning of this chapter and the procedure and practice provided in this chapter shall apply to all proceedings under this article, except where specifically otherwise provided herein.

(Subdivision two of section three enumerates various occupational diseases that are made compensable.)

(Sections 39 to 48, inclusive, require payment of compensation for occupational diseases, in a manner and in amount generally similar to cases of accidental injury.)

ARTICLE 4.

Security for Compensation.

§ 50. **Security for payment of compensation.**—An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state.

3. By furnishing satisfactory proof to the commissioner of his financial ability to pay such compensation for himself, in which case the commissioner shall require the deposit with the commissioner of such securities as the com-

missioner may deem necessary of the kind prescribed in subdivisions one, two, three, four and five, and paragraph a of subdivision seven of section two hundred and thirty-nine of the banking law, in an amount to be determined by the commissioner, to secure his liability to pay the compensation provided in this chapter. The commissioner may also require an agreement on the part of an employer to pay any awards commuted under section twenty-seven of this chapter, into the special fund of the state fund, as a condition of his being allowed to remain uninsured pursuant to this section. The commissioner shall have the authority to deny the application of an employer to pay such compensation for himself or to revoke his consent furnished, under this section at any time, for good cause shown. The employer qualifying under this subdivision shall be known as a self-insurer.

If for any reason the status of an employer under this subdivision is terminated, the security bond deposit referred to herein shall remain in the custody of the industrial commissioner for a period of at least twenty-six months. At the expiration of such time or such further time period as the commissioner may deem proper and warranted under the circumstances, and so designates, the commissioner may accept in lieu thereof, and for the additional purpose of securing such further and future contingent liability as may arise from prior injuries to workers and be incurred by reason of any change in condition of such workers warranting the industrial board making subsequent awards for payment of additional compensation, a policy of insurance furnished by the employer, his heirs or assigns or others carrying on or liquidating such business. Such policy shall be in a form approved by the superintendent of insurance and issued by any insurance company licensed to issue this class of insurance in this state. It shall only be issued for a single complete premium payment in advance by the employer. It shall be

given in an amount to be determined by the industrial commissioner and when issued shall be non-cancellable for any cause during the continuance of the liability secured and so covered.

(Section 50, subdivision 3-a, deals only with the payment of compensation by counties and municipalities and the insurance of such payment.)

(Section 50, subdivision 3-b, provides for the licensing of persons desiring to appear before the industrial board on behalf of self-insurers and prohibits those not so licensed from appearing.)

(Section 50, subdivision 4-a, lays down rules for the insurance and payment of compensation by counties and municipalities.)

§ 51. Posting of notice regarding compensation.—Every employer who has complied with section fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the commissioner, stating the fact that he has complied with all the rules and regulations of the department and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter. The commissioner may require any employer to furnish a written statement at any time showing the stock corporation or mutual association in which such employer is insured or the manner in which such employer has complied with any provision of this chapter. Failure for a period of ten days to furnish such written statement shall constitute presumptive evidence that such employer has neglected or failed in respect of any of the matters so required.

§ 52. **Effect of failure to secure compensation.**—Failure to secure the payment of compensation shall constitute a misdemeanor, punishable by a fine of not more than five hundred dollars or imprisonment for not more than one year, or both. Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for failure to secure the payment of compensation under this section.

All fines imposed under this chapter, except as herein otherwise provided, shall be paid directly and immediately by the officer collecting the same to the industrial commissioner for the benefit of the special fund created under subdivision eight of section fifteen of this chapter.

§ 53. **Release from all liability.**—An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

§ 54. **The insurance contract.—1. Right of recourse to the insurance carrier.** Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this state shall contain a provision setting forth the right of the commissioner to enforce in the name of the people of the state of New York for the benefit of the person entitled to the compensation insured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability

of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid.

2. **Knowledge and jurisdiction of the employer extended to cover the insurance carrier.** Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.

3. **Insolvency of employer does not release the insurance carrier.** Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy.

4. **Limitation of indemnity agreements.** Every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an employee by accidental means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided for by this chapter. Every such contract or agree-

ment of insurance issued by an insurance carrier covering the liability of an employer for the payment of the compensation provided by this chapter shall be deemed to include all employees of the employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such contract or agreement, unless any such employee or employees, or class of employees, shall by the terms of such contract or agreement be expressly excluded therefrom.

5. **Cancellation of insurance contracts.**—(This subdivision tells how insurance policies may be cancelled.)

6. **Insurance of officers of corporations.**—(This subdivision declares when executive officers may be treated as employees.)

7. **Limitation of the issuance of policies by a foreign insurance company.**—(Here follow the requirements with which insurance companies other than New York corporations must comply before doing business in New York.)

§ 55. **Acceptance of premium by carrier an estoppel.**—Acceptance of a premium on a policy securing to an employee compensation, either alone or in conneetion with other insurance, shall estop the carrier so accepting from pleading that the employment of such employee is not a hazardous employment or the employment is not carried on for pecuniary gain.

§ 56. **Subcontractors.**—A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such hazardous employment, unless the sub-

contractor primarily liable therefor has secured compensation for such employee so injured as provided in this chapter.

Any contractor, or his insurance carrier, who shall become liable for the payment of compensation to any employee or the dependents of a deceased employee of his subcontractor, pursuant to provisions of this section, may recover the amount of such compensation paid or for which liability is incurred from the subcontractor primarily liable for such compensation to the injured employee or his dependents. The claim for such recovery shall constitute a lien against any moneys due or to become due to the subcontractor from such general contractor. Such claim for recovery, however, shall not affect the right of the injured employee, or the dependents of a deceased employee, from recovering compensation due from the general contractor or his insurance carrier.

An owner of timber other than farm lands, who contracts with another to carry on or perform work or service in connection therewith, which work or service is, involves or includes a hazardous employment, shall be liable for and shall pay compensation to any employee of such contractor, or his subcontractor, if any, injured in the course of and arising out of such hazardous employment, unless the contractor, or the subcontractor, if any, primarily liable therefor has secured compensation for such employee so injured as provided in this chapter.

§ 57. **Restriction on issue of permits unless compensation is secured.**—(This section forbids the issuance of permits for public work unless the payment of compensation has been secured.)

ARTICLE 5.

State Insurance Fund.

§ 90. **Creation of state fund.**—There is hereby created a fund to be known as "the state insurance fund," for

the purpose of insuring employers against liability for personal injuries or death sustained by their employees and of assuring to the persons entitled thereto the compensation and benefits provided by this chapter or by any act providing for compensation now or hereafter enacted by the congress of the United States of America if such liability is incident to an employment carried on in this state. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter. Such fund shall be administered by the industrial commissioner.

§ 91. State treasurer custodian of fund.—The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers signed by the commissioner or deputy commissioner. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor and with sureties approved by the state comptroller conditioned for the faithful performance of his duty as custodian of the state fund. The state treasurer may deposit any portion of the state fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

§ 92. Catastrophe surplus and reserves.—(This section provides that specified percentages of all premiums shall be set aside to maintain a certain reserve.)

§ 93. **Investment of surplus or reserve.**—(Here follow directions governing the investment of funds of the state insurance fund.)

§ 94. **Administration expenses.**—(This section deals with the expenses of administering the state insurance fund.)

§ 95. **Rates.**—(This section deals only with premium rates in the state fund.)

§ 96. **Dividends.**—(This section provides for the formation of groups of employers and the payment of dividends based thereon.)

§ 97. **Groups for accident prevention.**—For any group established under the provisions of section ninety-six, membership in the group of any employer otherwise entitled to be admitted thereto may be conditional upon acceptance and maintenance of special rules as to accident prevention or medical care of employees. Such limitation of membership in the group may be established only upon proper evidence that a majority of the members of the group have approved such rules and only when such rules have been approved by the commissioner as sufficient to constitute a proper basis of differentiation as to membership in the group.

§ 98. **Payment of premiums.**—(This section tells how and when premiums must be paid into the state fund.)

§ 99. **Collection of premium in case of default.**—(This section applies only to the state fund.)

§ 100. **Withdrawal from fund.**—Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his

insurance contract for cancellation, provided he is not in arrears for premiums due the fund and has given written notice of his intention to withdraw not less than thirty days before the expiration of the period for which he has elected to insure in the fund.

§ 101. **Record and audit of payrolls.**—(This section requires the keeping of payroll records by employers insured by the state fund and their inspection.)

§ 102. **Wilful misrepresentation.**—Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor.

§ 103. **Inspections.**—The commissioner shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the commissioner shall have free access to such premises during regular working hours.

§ 104. **Disclosures prohibited.**—Information acquired by the state fund, or its officers or employees, from employers or employees pursuant to this chapter shall not be opened to public inspection, and any officer or employee who, without authority of the commissioner or pursuant to his regulations, or as otherwise required by law, shall disclose the same shall be guilty of a misdemeanor.

§ 105. **Reports of state insurance fund; examination by insurance department.**—The commissioner shall make reports to the superintendent of insurance concerning the state insurance fund at the same times and in the same manner as is required from mutual employers' liability and workmen's compensation corporations by section one hundred and ninety-two of the insurance law, and the super-

intendent of insurance may examine into the condition of such state insurance fund at any time, either personally or by any duly authorized examiner appointed by him for the purpose of determining the condition of the investments and the adequacy of the reserves of such fund.

§ 106. Advisory committee.—(This section provides that there shall be an advisory committee of the state insurance fund of nine members and defines their duties.)

ARTICLE 6.

Miscellaneous Provisions.

§ 110. Record and report of injuries by employers.—Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury, which shall cause a loss of time beyond the day or working shift on which the accident occurred, or which shall require medical treatment beyond ordinary first aid, a report thereof shall be made in writing by the employer to the commissioner upon blanks to be procured from the commissioner for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the commissioner. An employer shall furnish a report of any other accident resulting in an injury received by an employee in the course of his employment or an occupational disease incurred by an employee in the course of his employment whenever directed by the commissioner. An employer who refuses or neglects to make a report as required by this section shall be guilty of a

misdemeanor, punishable by a fine of not more than five hundred dollars.

§ 111. Information to be furnished by employer.—Every employer shall furnish the commissioner, upon request, any information required by him to carry out the provisions of this chapter. A member of the board, the commissioner, deputy commissioner, or any person deputized by the commissioner or board for that purpose, may examine under oath any employer, officer, agent or employee. An employer or an employee receiving from the commissioner a blank with directions to file the same shall cause the same to be properly filled out so as to answer fully and correctly all questions therein, or if unable to do so, shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the commissioner within the period fixed by the commissioner therefor.

§ 112. Inspection of records of employers.—All books, records and payrolls of the employers, showing or reflecting in any way upon the amount of wage expenditures of such employers shall always be open for inspection by the commissioner or any of his authorized auditors, accountants or inspectors for the purpose of ascertaining the correctness of the wage expenditure and number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in the administration of this chapter.

§ 113. Interstate commerce.—The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with

intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter.

§ 114. **Penalties for false representation.**—If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or any other person, any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor.

§ 115. **Limitation of time.**—No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor so long as he has no committee or guardian.

§ 116. **Sessions.**—The offices of the department shall be open for business during all business hours of all days except Sundays and legal holidays. All sessions of the board shall be public. The records of the board shall contain a record of each case considered, and all awards, decisions or orders with respect thereto. For convenience of parties and prevention of delay or expense, the board may hold sessions in cities other than Albany.

§ 117. **Rules.**—The board may adopt reasonable rules consistent with and supplemental to the provisions of this chapter and the labor law. The commissioner may make reasonable regulations consistent with the provisions of this chapter and the labor law.

§ 118. **Technical rules of evidence or procedure not required.**—The commissioner, board, referee or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties. Declarations of a deceased employee concerning the accident shall be received in evidence and shall, if corroborated by circumstances or other evidence, be sufficient to establish the accident and the injury.

§ 119. **Subpoenas.**—A subpoena or a subpoena duces tecum may be signed and issued by the commissioner, deputy commissioner, member of the board, referee or such other officer as may be designated by the commissioner. Failure to obey such subpoena shall constitute a contempt as provided by the civil practice act.

§ 120. **Fees of witnesses.**—Each witness who appears in obedience to a subpoena shall be entitled to the same fees as witnesses in a civil action in the supreme court.

§ 121. **Depositions.**—The commissioner or board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court.

§ 121-a. **Proof of dependency in foreign countries.**—In cases involving the dependency of aliens residing in foreign countries, transcripts of birth or marriage certificates, also documents and affidavits, certified by a local official or local magistrate and authenticated as to such official or magistrate by the secretary of state or other official having charge of foreign affairs, or a United States consul, in said

foreign country, shall be received in evidence for the purpose of proving dependency.

§ 122. **Transcripts.**—A copy of the testimony, evidence and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the department and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified. A copy of such transcript shall be furnished to any party upon payment of the fee for transcripts of similar minutes in the supreme court.

§ 123. **Jurisdiction of department to be continuing.**—The power and jurisdiction of the department over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings, awards, decisions or orders relating thereto, as in its opinion may be just.

§ 124. **Blank forms.**—The commissioner shall prescribe and distribute such blank forms as the administration of this chapter requires, including forms of notices and claims and forms for proving injury, death, medical or other attendance or treatment, employment and wage earnings. Insurance carriers shall constantly keep on hand at their own expense a sufficient supply of such blanks.

§ 125. **Undertakings.**—The commissioner may by regulation provide for the giving of undertakings by all subordinates who are empowered by this chapter to receive and disburse moneys, to be approved as to form by the attorney-general and as to sufficiency by the comptroller.

§ 126. **Expenses of administering workmen's compensation law.**—(This section provides that the expenses of the department in the administration shall be collected from insurance carriers pro rata.)

§ 127. Construction.—This chapter shall be read and construed in connection with the labor law.

§ 128. Unconstitutional provisions.—If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

§ 129. Actions or causes of action pending.—This act shall not affect any action pending or cause of action existing or which accrued prior to July first, nineteen hundred and twenty-two.

§ 130. Workmen's compensation premiums shall be deemed preferred claims.—(This section makes claims for premiums preferred claims in case of the bankruptcy of the employer or similar situation.)

ARTICLE 7.

Laws Repealed; When to Take Effect.

§ 140. Laws repealed.—Article fourteen-a and sections two hundred and fifteen to two hundred and nineteen-g, both inclusive, of chapter thirty-six of the laws of nineteen hundred and nine, as added by chapter six hundred and seventy-four of the laws of nineteen hundred and ten, are hereby repealed.

§ 141. When to take effect.—This chapter as amended shall take effect July first, nineteen hundred and twenty-two.

(The foregoing statute, abbreviated as indicated, includes all amendments effective on the date of the accident here involved—September 9, 1932.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 9

P. J. CARLIN CONSTRUCTION CO. AND THE TRAVELERS INSURANCE COMPANY,

Appellants,

vs.

EDWARD HEANEY AND STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION.

JOHN J. BENNETT, JR.,
Attorney General of New York.
HENRY EPSTEIN,
Solicitor General of New York.
JOSEPH A. McLAUGHLIN,
ROY WIEDERSUM,
Assistant Attorneys General,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 817

P. J. CARLIN CONSTRUCTION CO. AND THE TRAVELERS INSURANCE COMPANY,

Appellants,

vs.

EDWARD HEANEY AND STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK.

Appellees.

STATEMENT DISCLOSING MATTER AND GROUND MAKING AGAINST THE JURISDICTION OF THIS COURT.

MAY IT PLEASE THE COURT:

The Industrial Board of the State of New York, Appellee, in support of its objection to the jurisdiction of this Court to review the above entitled case on appeal, respectfully represents:

A.

The Matter Sought to be Reviewed is One of Local Concern—There is no Substantial Federal Question Presented Upon This Appeal.

On September 9, 1932, the appellee, Edward Heaney, was a bricklayer employed by the P. J. Carlin Construction

Co. and received injuries on that day as a result of being thrown from the steamer "Observation" into the water by reason of an explosion in or about said steamer. Said steamer or ferryboat was proceeding from Manhattan Island to Riker's Island—all within the boundaries of the State of New York.

At the time of the said explosion and prior thereto, the P. J. Carlin Construction Co. was the general contractor in connection with certain penitentiary construction work on Riker's Island, New York, which was being performed pursuant to a contract with the City of New York.

The contract between the City of New York and the P. J. Carlin Construction Co. contained the following clause:

> "Each Contractor shall investigate the existing means of transportation to and from Rikers Island. The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract."

Subsequent to the execution of the aforesaid contract, the P. J. Carlin Construction Co. entered into an agreement with George I. Forsyth, owner of the steamer, "Observation", whereby the latter was to "operate a ferry service for the transportation of men engaged upon the construction of the Riker's Island Penitentiary Building" upon certain terms and conditions. Among other terms of this contract was one providing that Forsyth was to be compensated for this transportation by collecting fares from the men at the rate of ten cents a round trip. The P. J. Carlin Construction Co. guaranteed to Forsyth a daily total of $60 in fares.

The steamer "Observation" was not owned, operated or controlled by the employer-appellant, P. J. Carlin Con-

struction Co. The employer-appellant was not a carrier in any sense nor was it interested in the investment of money in ships. There is no evidence in the record to show that the said employer, or in fact anyone else, was guilty or legally implicated in a maritime tort.

The appellee, Edward Heaney, performed no duties on said steamer nor had any connection with the operation thereof. At the time of the accident he was merely being transported to Riker's Island.

The only means of transportation between the Mainland and Riker's Island was the steamer "Observation" and the municipal ferry. The employees of P. J. Carlin Construction Co. were instructed by the employer to use only one means of transportation from the Mainland to Riker's Island and return, namely, the steamer "Observation" and were forbidden to ride on the municipal ferry.

The record discloses that the employer issued passes to the employees, generally supervised their conduct while on the steamer "Observation" and restricted the employees, including the Appellee, Edward Heaney, to this one means of ingress to and egress from Riker's Island.

In the Appellate Courts of New York State, the appellants herein contended that the injuries sustained by the Appellee, Edward Heaney, did not arise out of and in the course of the employment, and that the matter of the claim was subject to maritime jurisdiction. These issues were determined adversely to the contention of the appellants in both the Supreme Court, Appellate Division, Third Department, and the Court of Appeals of the State of New York.

The record on appeal in the case at bar contains no proof establishing a tort. It merely discloses that the Appellee, Edward Heaney, suffered injuries as a result of being thrown into the water by reason of an explosion in or about the steamer "Observation". The record also discloses

that the owner of the steamer "Observation" lost his life in the same occurrence.

To justify an award of disability compensation under the terms of the Workmen's Compensation Law of the State of New York, proof of the commission of a tort is unnecessary. Proof that the accidental injuries arose out of and in the course of the employment constitutes the principal element of liability. The award under the Workmen's Compensation Law in favor of the Appellee, Edward Heaney, was not made on the theory that a tort had been committed. His rights under said Workmen's Compensation Law derive not from tort but from contract and this contract was not maritime in nature. It involved and embodied the contract of employment to perform services in connection with the construction and erection of a penitentiary on Ricker's Island, New York.

The appellee, Edward Heaney's employment pertained to local matters, having no relation to navigation and commerce, and the application of the Workmen's Compensation Law worked no material prejudice to the characteristic features of the General Maritime Law or interfered with its uniformity.

It is therefore urged that the matter sought to be reviewed herein by this Court is one purely of local concern and presents no substantial federal question upon this appeal.

B.

The Validity of the State Statute as Applied in this Case is Established by Principles Expressed by this Honorable Court in Cases Heretofore Decided.

Miller's Indemnity Underwriters v. *Braud* (1926), 270 U. S. 59, 70 L. Ed. 470;

Grant Smith-Porter Ship Co. v. *Rhode* (1921), 257 U. S. 469, 66 L. Ed. 321;

Alaska Packers Association v. *Ind. Acc. Commission* (1927), 276 U. S. 467;

Sultan Railway & Timber Co. v. *Dept. of Labor & Industries* (1927), 277 U. S. 135;

State Ind. Comm. v. *Nordenholt* (1922), 259 U. S. 263, 66 L. Ed. 933;

State Industrial Board v. *Terry & Company*, 273 U. S. 639.

WHEREFORE, appellee respectfully submits that the Supreme Court of the United States should refuse to assume jurisdiction to review the judgment and decree appealed from.

Yours very truly,

JOHN J. BENNETT, JR.,
Attorney General of the State of New York.
HENRY EPSTEIN,
Solicitor General,
Solicitor for the Industrial Board
of the State of New York, Appellee.

JOSEPH A. MCLAUGHLIN,
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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 9

P. J. CARLIN CONSTRUCTION CO. and THE TRAVELERS INSURANCE COMPANY,

Petitioners,

v.

EDWARD HEANEY and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENT INDUSTRIAL BOARD OF THE STATE OF NEW YORK

Statement

This is a proceeding on writ of certiorari to the Supreme Court of the State of New York to review a judgment affirming an award to the Respondent, Edward Heaney, under the provisions of the Workmen's Compensation Law of the State of New York.

Proceedings Below

Because of injuries suffered on September 9, 1932, while in the employ of the P. J. Carlin Construction Co., the Respondent Heaney presented to the Respondent Industrial Board of the State of New York a claim for compensation under the statutes of New York known as the Workmen's Compensation Law. (Chapter 816 of the Laws of 1913, as amended and reenacted by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the Consolidated Laws, as amended.)

The said State Industrial Board assumed jurisdiction of the claim, held hearings in connection therewith, awarded compensation to said injured employee and directed payment of the award by the Petitioners, P. J. Carlin Construction Co. and The Travelers Insurance Company, employer and insurance carrier respectively.

The Petitioners challenged the making and the imposition of the award against them on the ground that the accidental injuries suffered by Heaney did not arise out of and in the course of the employment, and on the further ground that jurisdiction over the subject matter of the claim was vested solely in admiralty.

The said Petitioners thereupon appealed to the Appellate Division of the Supreme Court of New York, Third Judicial Department, from the determination of the State Industrial Board. Formal Findings of Fact and Conclusions of Law were prepared by the State Industrial Board and served on all parties in interest. (R. 4-7.)

The said Appellate Division unanimously affirmed the determination of the State Industrial Board (243 App. Div. 648).

Thereafter, the Petitioners obtained leave from the Court of Appeals of the State of New York to appeal to said Court from the Order of the Appellate Division.

The Court of Appeals of the State of New York affirmed the Order of the said Appellate Division (269 N. Y. 93). Crouch, Loughran and Finch, JJ., concurred in the opinion for affirmance written by Hubbs, J. (R. 55-61). Crane, Ch. J., dissented in an opinion in which O'Brien, J. concurred (R. 61-67). Lehman, J. also dissented (R. 67).

The findings of law and fact of the State Industrial Board (R. 4-7) were thus affirmed by the State Appellate Courts thereby establishing that the accidental injuries suffered by Heaney arose out of and in the course of the employment and that the Industrial Board of the State of New York was vested with jurisdiction over the claim.

Facts

On September 9, 1932, Edward Heaney was a bricklayer employed by the Petitioner, P. J. Carlin Construction Co., and received injuries on that day as a result of being thrown from the steamer "Observation" into the water by reason of an explosion in or about said steamer (R. 11, 14, 17, 18). Said steamer or ferryboat was proceeding from Manhattan Island to Riker's Island, within the boundaries of the State of New York (R. 18, 26).

At the time of the said explosion and prior thereto, the P. J. Carlin Construction Co. was the general contractor in connection with certain penitentiary construction work on Riker's Island, New York, which was being performed pursuant to a contract with the City of New York (R. 27, 30, 50).

The contract between the City of New York and the P. J. Carlin Construction Co. contained the following clause:

> "Each Contractor shall investigate the existing means of transportation to and from Rikers Island.

> The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract." (R. 15, 23, 50.)

Subsequent to the execution of the aforesaid contract, the P. J. Carlin Construction Co. entered into an agreement with George I. Forsyth, owner of the steamer, "Observation", whereby the latter was to "operate a ferry service for the transportation of men engaged upon the construction of the Riker's Island Penitentiary Building" upon certain terms and conditions (R. 28, 33, 46, 47). Among other terms of this contract was one providing that Forsyth was to be compensated for this transportation by collecting fares from the men at the rate of ten cents a round trip. The P. J. Carlin Construction Co. guaranteed to Forsyth a daily total of $60.00 in fares (R. 47).

The steamer "Observation" was not owned, operated or controlled by the P. J. Carlin Construction Co. (R. 28). The said company was not a carrier in any sense nor was it interested in the investment of money in ships. There is no evidence in the record to show that the said company, or in fact anyone else, was guilty or legally implicated in a maritime tort.

Heaney performed no duties on said steamer nor had any connection with the operation thereof. At the time of the accident he was merely being transported to Riker's Island.

The only means of transportation between the Mainland and Riker's Island was the steamer "Observation" and the municipal ferry (R. 17). The employees of P. J. Carlin Construction Co. were instructed by the said employer to use only one means of transportation from the Mainland to Riker's Island and return, namely, the steamer

"Observation" and were forbidden to ride on the municipal ferry (R. 15-17, 21).

The record discloses that the employer issued passes to the employees (R. 35), generally supervised their conduct while on the steamer "Observation" (R. 21, 24, 45) and restricted the employees, including the Respondent, Heaney, to this one means of ingress to and egress from Riker's Island (R. 16).

In the Appellate Courts of New York State, the Petitioners herein contended that the injuries sustained by the Respondent, Heaney, did not arise out of and in the course of the employment, and that the matter of the claim was subject to maritime jurisdiction. These issues were determined adversely to the contention of the Petitioners in both the Appellate Division of the Supreme Court, Third Judicial Department, and the Court of Appeals of the State of New York.

The record in the case at bar contains no proof establishing a tort. It merely discloses that the Respondent, Heaney, suffered injuries as a result of being thrown into the water by reason of an explosion in or about the steamer "Observation". The record also discloses that the owner of the steamer "Observation" lost his life in the same occurrence.

In the catastrophe aforementioned, many other workmen on board lost their lives and many others were injured. Because of the circumstances, resort to the beneficial provisions of the Workmen's Compensation Law seems to be the only course available whereby the welfare of scores of workmen and their dependents will be reasonably secured.

Summary of Argument

1. The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract.

2. The rights of Heaney and the liability of the Petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application.

3. Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.

4. The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern.

5. The case of *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, mainly relied upon by the Petitioners, is plainly distinguishable from the case at bar and is in no respect controlling.

6. The provisions incorporated in Section 29 of the Workmen's Compensation Law working an assignment and prescribing an additional cause of action against the negli-

gent third party in favor of the employer and insurance carrier in no way affect the operation and validity of the Workmen's Compensation Law in respect to the accidental injuries suffered by Heaney.

POINT I

The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract.

A proceeding under the Workmen's Compensation Law of the State of New York is not one founded upon or sounding in tort. Tort is not an element in the liability created by the Act. On the contrary, the basis of this legislation is liability without fault and the whole idea of tort or wrong is eliminated by the statute.

The principle of compensation is the payment of the employer's share of a common loss in a common undertaking. The status existing between the employer and employee is of a contractual or quasi-contractual nature. It results from a domestic contract of hire employing within New York State a resident thereof. The obligations become effective when the statutory conditions concur to fix the right to indemnity for injury or death and the direct subject matter of the adjudication is the obligation to compensate the employee or his dependents because of the hiring.

The obligation at the base of an award is one imposed by the State and attaches to every contract of hiring within the terms of the Act.

In *Post* v. *Burger & Gohlke*, 216 N. Y. 544, and later in *Doey* v. *Howland Co. Inc.*, 224 N. Y. 30, the Court of

Appeals of the State of New York outlined the underlying philosophy of the Workmen's Compensation Law of that State. The Court said in the latter case:

> "* * * In determining whether a contract be of maritime nature, locality is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done. (*Erie R. R. Co.* v. *Welsh*, 242 U. S. 303.) In torts the rule is different. There, jurisdiction depends solely upon the place where the tort was committed, which must have been upon the high seas or other navigable waters. (*Atlantic Transport Co. of W. Va.* v. *Imbrovek*, 234 U. S. 52.) An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment." (pp. 35, 36.)

The above portion of the citation from the *Doey* case, *supra*, was quoted among other things in the opinion in *State Industrial Commission* v. *Nordenholt*, 259 U. S. 263, 271, and appears to have been approved by this Court. Although this Court in the course of the opinion in *Nordenholt, supra* (p. 272), disapproved the deductions drawn by the New York Court of Appeals in certain cases, it seemingly found no fault with the reasoning in the above quoted portion of the opinion in the *Doey* case.

As a matter of fact, this Court appears to have recognized the possible force of this philosophy by the following statement in *State Industrial Commission* v. *Nordenholt, supra:*

> "* * * Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as implied agreements or otherwise." (p. 276.)

Generally in the same connection, in *Zirpola* v. *T. & E. Casselman, Inc.*, 237 N. Y. 367, the New York Court of Appeals, by Cardozo, J., said:

> "* * * The Workmen's Compensation Act regulates the relation, not between a workman and the world at large, but between workman and employer. It does indeed wipe out the right of action against the employer, whether in favor of the workman himself or in favor of his personal representatives for the benefit of next of kin (*Shanahan* v. *Monarch Engineering Company*, 219 N. Y. 469). In doing this, it charges the employer with liabilities of a different order. It leaves untouched, on the other hand, the duties and liabilities of wrongdoers outside of the relation which it regulates, and contents itself with guarding against a duplication of benefits by appropriate provisions for subrogation or allowance." * * * (p. 373.)

Although this Court in *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 423, in which an award under the workmen's compensation law of the State of Utah was involved, stated that workmen's compensation legislation rests upon the idea of status, and not upon that of implied contract, it is plain that this statement in no wise indicates that the rights of a claimant under the workmen's com-

pensation law sound in tort, and admittedly such statement is entirely consistent with the contentions herein that the rights of the claimants under the New York Workmen's Compensation Law derive from contract inasmuch as this status becomes effective only after the consummation of a contract of hire and as an incident thereof.

POINT II

The rights of Heaney and the liability of the petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application.

The Petitioner, P. J. Carlin Construction Co., the employer of Heaney, was not the owner of the steamship "Observation", employed none of the crew thereof, nor in any way engaged in aiding the vessel in the performance of her mission as a vessel. The entire responsibility for the carriage and safety of the passengers of the steamship "Observation" reposed solely upon Forsyth, the owner thereof, and rested in no respect upon the P. J. Carlin Construction Co.

The P. J. Carlin Construction Co. was not the operator of the boat, was not a carrier in any sense, was not interested in any investment in ships, and was not in any manner guilty or legally implicated in a maritime tort.

The P. J. Carlin Construction Co. merely undertook the responsibility of guaranteeing the deficiency between fares collected each day by the owner of the "Observation" and an average of $60.00. It had nothing whatever to do with the control of the vessel, its movements or its operation within the domain of maritime commerce or transportation.

Heaney performed no duties in connection with said steamship and the work for which he was employed was not of a maritime nature and had nothing to do with a maritime employment. He was employed as a bricklayer to aid in the construction and erection of certain buildings on Riker's Island within the confines of the State of New York. His duties had no direct or indirect effect on navigation or commerce and were of pure local concern.

He sought no recovery against the employer, P. J. Carlin Construction Co., in the compensation proceeding because of any wrong perpetrated by the employer, but sought a recovery as the result of injuries for which the compensation statute, read into the contract, gave a right to recovery.

He was not an employee of Forsyth, the owner of the steamship, and sought compensation before the State Industrial Board because of no relationship existing between Forsyth and himself or between the employer, P. J. Carlin Construction Co., and Forsyth. He had nothing to do with the steamship except that the boat became the means of ingress and egress to the locality of his work. His presence on the boat was merely incidental to his duties as a bricklayer under his contract of employment, the same as though he approached his work on Riker's Island by means of a single bridge or roadway.

The rights and liabilities of Heaney and his employer had no direct relation to navigation and the application of the local law would not affect rules of the sea whose uniformity is essential. As was concisely said by Hubbs, J., in the opinion of the Court of Appeals in this case:

> "The contract of employment was for the services of the claimant in the erection of a building. It was not a contract to do work upon a vessel in navigable waters nor even to do work remotely connected

with any undertaking having to do with navigation or commerce. The presence of the claimant upon the boat was a mere incident of the contract of employment, it having been found as a fact that he was on the boat as an employee of the contractor against whom the award has been made." (R. 56.)

The non-maritime aspects of Heaney's employment and services are not entirely unlike the non-maritime character of the contract for the construction of "The Ahala" and the employment of the injured employee in connection therewith in *Grant-Smith Porter Ship Co.* v. *Rohde*, 257 U. S. 469.

In that case, the application of the workmen's compensation law of Oregon to a claim for an injury to a carpenter who was constructing a bulkhead on an incompleted vessel lying in navigable waters was involved. The Court said:

"The contract for constructing 'The Ahala' was nonmaritime, * * *. The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. Union Fish Co. *v.* Erickson, 248 U. S. 308, 63 L. ed. 261, 39 Sup. Ct. Rep. 112." (pp. 475, 476.)

* * * * * * *

"The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." (p. 476.)

It consequently follows that since the theory of an award under the Workmen's Compensation Law is contractual in nature and not delictual, the place of injury is unimportant when the contract of employment or the essential characteristics of the employment is non-maritime. Heaney's employment, being non-maritime, the existence of a maritime tort or its locality is therefore immaterial and the application of the Workmen's Compensation Law works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony and uniformity of that law in its international or interstate relations.

POINT III

Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.

The case of *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 59, concerned a diver who submerged himself from a floating barge anchored in the navigable Sabine River, thirty-five feet from the bank, for the purpose of sawing off timbers of an abandoned set of ways, once used for anchoring ships, which had become an obstruction to navigation. The air supply failed and he died of suffocation. The application of the local workmen's compensa-

tion law was upheld by this Court. This Court, referring to *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, said:

> "The words of the local statute applied to the employment and prescribed an exclusive remedy. We said the cause was controlled by the principle that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by state statutes."

This Court further said in respect to the case then under consideration:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

In the case of *Sultan Railway & Timber Co.* v. *Department of Labor & Industries*, 277 U. S. 136, the question at issue was whether men employed in handling and riding logs on navigable waters were brought within the operation of the State workmen's compensation laws. This Court, upholding the operation of the local state law, said:

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work

material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." (p. 137.)

In the case of *Alaska Packers Association* v. *Industrial Accident Commission*, 276 U. S. 467, the workman was employed to perform services in connection with the fish canning business and was injured while attempting to push a stranded boat into navigable water. This Court stated:

> "Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character." (p. 469.)

In *Madderns* v. *Fox Film Corporation*, 237 N. Y. 614, the claimant while in the employ of the defendant, Fox Film Corporation, a manufacturer of moving picture films, and engaged in helping to make a picture on a boat in the Hudson River, fell into the water, and as a result, developed tuberculosis. The defendant contended that the State Industrial Board had no jurisdiction, the case being one within admiralty jurisdiction. The Court of Appeals of the State of New York upheld the award made by the State Industrial Board pursuant to the provisions of the Workmen's Compensation Law of that State.

The same principles pronounced in the above mentioned cases were also proclaimed by the decisions of this Court in the cases of *State Industrial Board* v. *Terry & Tench Co., Inc.*, 273 U. S. 639, and *Rosengrant* v. *Harvard*, 273 U. S. 664.

It will be observed that in the foregoing cases, the injuries were suffered on navigable waters and the employment partook of a maritime character. Nevertheless, the strict rule of exclusive federal jurisdiction did not apply and the recovery under local state compensation laws was approved and allowed.

The location of an injury upon navigable waters becomes significant only when the contract of employment or the nature of employment is maritime and the application of the workmen's compensation law would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations. If the subject matter of the contract of hire or the employment is non-maritime, the place of the injury as heretofore pointed out is unimportant and becomes merely a matter of local concern. Also, if the injury occurs on land, the local workmen's compensation law applies even though the nature of the employment or the contract of hire is essentially maritime. (*State Industrial Commission* v. *Nordenholt, supra.*)

However, where the facts clearly establish that the matter is of mere local concern, as in the case at bar, the application of the workmen's compensation law is in no way incompatible with the general features and purposes of the maritime law.

La Casse v. *Engineering Works*, 242 Mich. 454.

The cases cited and mainly relied upon by the Petitioners can be readily reconciled with the above outlined principles and doctrines. In these cases the injuries were sustained on navigable waters, the contract of hire or the subject matter of the employment was clearly maritime and the application of the local compensation laws would seriously encroach on admiralty jurisdiction by direct in-

terference with navigation and maritime affairs. In many of these cases the facts disclose that either the original proceeding was a libel *in rem* or recovery was sought from the owner or operator of the vessel in connection with which the injuries were sustained.

The principal cases cited by the Petitioners falling within the above limitations, are:

Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52;
Baizley Iron Works v. *Span*, 281 U. S. 222;
Chelentis v. *Luckenback S. S. Co.*, 247 U. S. 372;
Crowell v. *Benson*, 285 U. S. 22;
Gonsalves v. *Morse, etc., Co.*, 266 U. S. 171;
Great Lakes, etc., Co. v. *Kierejewski*, 261 U. S. 479;
Employers' Liab. Assur. Corp. v. *Cook*, 281 U. S. 233;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
London Guarantee & Acc. Co. v. *Ind. Acc. Comm.*, 279 U. S. 109;
Messel v. *Foundation Co.*, 274 U. S. 427;
Minnie v. *Port Huron Terminal Co.*, 295 U. S. 647;
Northern Coal & Dock Co. v. *Strand*, 278 U. S. 142;
Robins, etc., Co. v. *Dahl*, 266 U. S. 449;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205.

For the same reasons mentioned above the case of *Kenward* v. *The Admiral's Peoples*, 295 U. S. 649, cited in the dissenting opinion below and also by the Petitioners, is distinguishable from the case at bar inasmuch as the proceeding therein concerned a libel *in rem* brought by an injured passenger against the vessel.

Confirmation of the aforesaid is found in *Grant Smith-Porter Ship Co.* v. *Rohde, supra*, wherein this Court stated, in referring to the cases of *Jensen, Chelentis, Stewart, supra*, and *Union Fish Co.* v. *Erickson*, 248 U. S. 308, that;

> "In each of them the employment or contract was maritime in nature and the rights and liabilities of

the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity." (p. 477.)

POINT IV

The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern.

The above heading is divisible into the following three appropriate considerations:

1. Does the application of the Workmen's Compensation Law in the case at bar work any material prejudice to the characteristic features of the General maritime law?

2. Does it interfere with the proper harmony and uniformity of that law in its international and interstate relations?

3. Is the subject matter of Heaney's claim other than of purely local concern?

Respondent submits that the burden of a satisfactory affirmative to the challenges contained in the above three subdivisions rests with the Petitioners herein. In so far as the proof in the record is concerned, no attempt to support the affirmative in any instance is evident. Nor has the burden been met by the Petitioners of establishing an admiralty tort or that P. J. Carlin Construction Co., the employer, or Forsyth, the owner of the boat, were guilty or legally implicated in a maritime tort.

On the other hand, no distinction in principle exists between the case at bar and the *Braud, Sultan* and other cases cited *supra* under the previous point, and in view of all the attending facts and circumstances in the instant case, a negative answer to each of the above propositions is unquestionably justified.

As more fully pointed out heretofore, the Petitioner, P. J. Carlin Construction Co., was not the owner of the steamship "Observation", employed none of the crew, was in no way engaged in aiding the vessel in the performance of her mission, was not a carrier in any sense, was not interested in the investment in ships and was in no manner guilty or legally implicated in maritime tort.

To the same effect, Heaney performed no duties in connection with said steamship, was not an employee of the owner of the vessel and his duties had no direct or indirect effect on navigation or commerce but were of pure local concern. He was employed as a bricklayer in the construction and erection of buildings on Riker's Island, within the territorial confines of the State of New York.

Heaney was engaged in the performance of a contract non-maritime in nature. The recovery which he seeks is a part of the compensation constructively agreed to be paid for the services rendered in the course of his employment. Clearly if Heaney's action were for wages due under the contract of employment, the Federal Court would have no jurisdiction. Jurisdiction is not conferred on that Court because another part of the agreed compensation is sought to be recovered, or because there happens to be an independent contract for passage with a third party or a tort liability on the part of the third party.

The main purpose sought to be achieved by granting to Federal authority exclusive jurisdiction of the maritime law is to guarantee the harmony and uniformity of that

law throughout the United States. Hence, the owner of a vessel or the operator thereof is and properly should be subject to the same rights, liabilities and immunities in connection therewith regardless of the location of the vessel in the navigable waters of the United States.

However, in the case at bar, P. J. Carlin Construction Co. was not a carrier or an owner of a vessel, and had no maritime rights or immunities to be safeguarded. Heaney is not seeking to enforce any rights as a passenger, but as an injured employee or workman, and applying the Workmen's Compensation Law of the State of New York as a means and method for his recovery does not affect navigation or the harmony or uniformity of the maritime law.

In closing the discussion under this heading, it should also be said that a subsidiary criterion recognized by this Court seemingly is the policy of Congress of encouraging investments in ships. This was adverted to in *Southern Pacific Co.* v. *Jensen, supra.* The record does not disclose that the P. J. Carlin Construction Co. was an investor in ships or in any way interested in shipping or maritime matters.

POINT V

The case of *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, mainly relied upon by the petitioners, is plainly distinguishable from the case at bar and is in no respect controlling.

The procedural element, probably, is the most vital consideration in *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502. The suit was brought in admiralty to limit the owner's liability and all claimants were brought into concourse. The Court itself was in position to afford compre-

hensive and adequate relief and was governed by fundamental principles of the equity jurisdiction.

> "But we think" this Court said, "that the admiralty court, having taken jurisdiction and brought all claimants into concourse, should have given complete relief." (p. 512.)

The *Hicks* case, *supra*, is differentiated from the case at bar, as will be indicated by the observations of this Court with reference to the surrounding circumstances:

> "Those who were killed and injured in the disaster were of three classes: (1) Regular employees of Kellogg & Sons in the Edgewater plant. (2) Men who had applied on December 18 for work in discharging the cargo of a ship expected on that day. She did not then arrive, and they were given employment check stubs and told to return on the following day, which they did; but as she had not then docked they were advised to report again on the morning of the accident. * * * (3) Men seeking employment in answer to an advertisement for laborers inserted in the New York newspapers, * * *." (p. 508.)
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> * * * * * * *
>
> "Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. The injury to the passengers resulted from negligence of the company's agents in the navigation of the launch. It was a maritime tort." (pp. 512, 153.)
>
> * * * * * * *
>
> "Kellogg & Sons sustained towards employees injured or killed the dual relationship of a carrier by water and a general employer at its Edgewater plant.

Under the federal statutes the company, acting in the first capacity, was entitled to a limitation of liability unless the claimants could prove negligence with the owner's privity or knowledge. They assumed the burden of proving such negligence. They sustained it and are entitled to recover according to the rules of the maritime law, including, of course, any applicable death statute." (p. 514.)

The principal distinguishing features between the *Hicks* case, *supra*, and the case now before this Court become more apparent by the following summarized comparison in which we designate the matter referring to the *Hicks* case as "A" and the matter referring to the case at bar as "B".

1. *"A"* The employer in the *Hicks* case was the owner of the boat, the "Linseed King."

"B" The employer of Heaney was not the owner of the "Observation".

2. *"A"* The employer in the *Hicks* case "undertook the interstate carriage of passengers by water on a launch operated by its servants."

"B" The employer of Heaney was not a carrier in any sense whatsoever, and the carriage in any event was not inter but intrastate.

3. *"A"* The owner in the *Hicks* case "sustained toward employees injured or killed the dual relationship of a carrier by water and a general employer". As owner it "was entitled to a limitation of liability unless the claimants could prove negligence with the owner's privity or knowledge".

"B" The employer of Heaney sustained the single relationship of employer, and had no right to limit his liability under the federal statutes.

4. *"A"* A moving consideration in the decision in the *Hicks* case is reflected by the citation and

quotation of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, in respect to the inconsistency of the compensation acts "with the policy of Congress to encourage investment in ships".

"*B*" The employer of Heaney was not an investor in ships and may not avail himself of any such argument.

5. "*A*" The owner of the "Linseed King" in the *Hicks* case was guilty of maritime tort which is the basis of the Court's decision that admiralty alone had jurisdiction.

"*B*" Not only is there no evidence or claim that the employer of Heaney was guilty of or legally implicated in a maritime tort, but the record discloses no evidence whatsoever of a maritime tort and consequently there is no basis for admiralty jurisdiction.

In the case at bar, the P. J. Carlin Construction Co. was not a carrier of passengers by water, it was not guilty of a maritime tort and the proceeding on the claim of Heaney was not one to "impose liability for such a tort", as the proceeding in the *Hicks* case, *supra*, was held to be.

POINT VI

The provisions incorporated in Section 29 of the Workmen's Compensation Law working an assignment and prescribing an additional cause of action against the negligent third party in favor of the employer and insurance carrier in no way affect the operation and validity of the Workmen's Compensation Law in respect to the accidental injuries suffered by Heaney.

The Petitioners allege in substance that the Workmen's Compensation Law of the State of New York is invalid as applied to an injury occurring on navigable waters,

as the provisions of Section 29 of the Act accords an assignment and transfer to the employer and insurance carrier of the employee's cause of action against a negligent third party, and also because it provides for the recovery by the same parties from a negligent third person of such sums directed paid into the Special Funds prescribed by other sections of the act, or expended for certain other purposes, in death cases where no persons are entitled to compensation.

The constitutionality of Section 29 of the Workmen's Compensation Law was upheld by the Supreme Court of the United States in the case of *Staten Island Railway* v. *Phoenix*, 281 U. S. 98.

The issue in the present case only concerns the right of recovery of the Respondent Heaney, and the liability of his employer under the Workmen's Compensation Law of New York State for injuries occurring in the course of the employment and has no relation to a possible cause of action against any third party. Whether Section 29 accorded Heaney an election of remedies or preserved to him or to his employer or insurance carrier the right to proceed against a third party patently is not relevant and entirely beside the issues.

The right to compensation is not dependent upon the existence of a claim or cause of action against a third party. The right of an employer and insurance carrier to be subrogated to any rights which the injured employee might have against a third party is merely a statutory right, an additional consideration or favor accorded to the employer and insurance carrier in the compensation scheme.

The effect of the statute is not to guarantee collection of damages as a result of the assignment, and no liability on the part of a third party is created by the statute. As was aptly said in the opinion of the Court below,

the assigned cause may be valueless as the result of contributory negligence on the part of the injured employee, inability of the assignee to establish negligence on the part of the third party, financial irresponsibility of the third person, or that conduct, tortious under the law of the forum where the compensation contract is enforceable, is not tortious under the law of the forum where the accident occurred.

Likewise, no sound reason is manifest for the nullification of the rights and liabilities between the parties under the compensation law for the reason that there exists incapacity on the part of the assignee of the cause of action, based upon the possible tort liability of a third person to maintain an action thereon. To do so would defeat the main purpose of the compensation contract of which the provision for assignment is a mere incident. The fact that the assigned cause may prove of no value in the hands of the assignee is a matter wholly foreign to the liability arising out of the employer-employee relationship.

In respect to the possible additional cause of action provided by Section 29 where payment is made to the special funds in all cases of death where there are no persons entitled to compensation, while it is not relevant in the case, the Court's attention is respectfully called to the fact that should a third party who has the right to resort to admiralty be sued, there is nothing in the Workmen's Compensation Law, and more particularly in Section 29 thereof, which would deprive said individual of the right to limit his liability.

Neither will anyone deny that a negligent third party may interpose as a defense the contributory negligence of the employee, or any other appropriate defense, in any action brought by the employer or insurance carrier under this Section. Likewise, there seems little doubt that the same defenses would be available by virtue of the gen-

eral maritime law. Section 29 nowhere indicates otherwise or that the proper uniformity and harmony of the maritime law would be imperiled by that section.

In the case at bar, there is no death claim nor is there any evidence to show a right of action by Heaney against a third party for negligence. The owner of the steamboat "Observation", as the evidence shows, is dead. In addition thereto, as pointed out hereinabove, there is no evidence of any kind in the record disclosing negligence of a third party.

The Petitioners contend that the state can not create, enlarge, diminish or destroy the rights and liabilities incident to the maritime law. Section 29 attempts none of these things. As the Court in *Staten Island Railway* v. *Phoenix Co., supra,* stated at page 108:

> "In an action to enforce it, (the $1,000 payment to the State Fund) the appellant could as the State Court has held in the present case, 'avail itself of any defense which it has or ever had'."

In *Lumber Mutual Casualty Insurance Company* v. *Edward A. Thompson, Inc.,* 134 Misc. Rep. 370, 235 N. Y. S. 646 (certiorari denied by this Court, 286 U. S. 27, after a second trial and appeal in the state courts, 137 Misc. 379, 244 N. Y. S. 20; 234 A. D. 841), the Appellate Term of the Supreme Court of the State of New York, in directing a new trial, held that Section 29 of the Workmen's Compensation Law does not interfere with the proper harmony and uniformity of the maritime law. The Court there said:

> "As was pointed out in the Jensen case (page 216 of 244 U. S. (37 S. Ct. 524)) the saving clause of section 256 (now 28 USCA §371) of the Judicial Code leaves some power in the states to affect by state legislation the general maritime law. * * * No act of Congress expressly declaring against as-

signing a chose in action for a maritime tort has been called to our attention. * * * The right of an assignee of a chose in action to sue in his own name was recognized in admiralty long before it was permitted in common law. See Minturn *v.* Alexandre (D. C.) 5 F. 117; Cobb *v.* Howard, 3 Blatchf. 524, Fed. Cas. No. 2924."

It is also significant to observe that in the *Hicks* case, *supra*, the next of kin of the deceased, even though admiralty did not and does not provide therefor, were allowed to present their claims before the United States Equity Court because the laws of the State of New York gave to such individuals a cause of action in the event of death caused by negligence.

Furthermore, the enforcement by an assignee of a cause of action in tort is not repugnant to the general policy of Congress. In the Longshoremen's and Harbor Workers' Compensation Act, Congress has provided that the cause of action of an injured employee coming within the purview of that act is assigned to the employer paying compensation which he may enforce.

IN CONCLUSION

It is submitted that the aforesaid establishes as follows:

A. The rights of claimants and the liability of employers and insurance carriers under the Workmen's Compensation Law of the State of New York, derive, not from tort, but from contract.

B. The rights of Heaney and the liability of the petitioners arise out of a contract or subject matter non-maritime in nature to which the local state laws have sole application.

C. Even though the injury occurs on navigable waters and the contract or employment is maritime, there is no federal constitutional or statutory inhibition against the application of the Workmen's Compensation Law as it is a matter purely of local concern, unless such application works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international or interstate relations.

D. The application of the Workmen's Compensation Law in the case at bar works no material prejudice to the characteristic features of the general maritime law nor interferes with the proper harmony or uniformity of that law in its international and interstate relations. The subject matter of Heaney's claim is one purely of local concern.

Wherefore, the judgment below should be affirmed with costs.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 9.—October Term, 1936.

P. J. Carlin Construction Co. and The Travelers Insurance Co., Petitioners, *vs.* Edward Heaney and State Industrial Board of the State of New York. } On Writ of Certiorari to the Supreme Court of the State of New York.

[November 9, 1936.]

Mr. Justice McReynolds delivered the opinion of the Court.

Seeking an award for injuries received in the course of his employment respondent, Heaney, instituted this proceeding before the New York State Industrial Board against his employer, P. J. Carlin Construction Company, and its insurance carrier, The Travelers Insurance Company, petitioners here. The Board granted an award; the Appellate Division and the Court of Appeals approved.

In September, 1932, the Construction Company, general contractor with principal place of business in New York City, was engaged in building operations on Rikers Island in East River. Respondent and others employed about the work crossed daily from New York City on the "Observation", a steamboat owned by Captain Forsythe. They paid for this service.

The owner operated the vessel in pursuance of an agreement with the Construction Company which provided: "You are hereby licensed to operate a ferry service for the transportation of the men engaged upon the construction of the Rikers Island Penitentiary Building." "You are to be compensated therefor by collecting fares from the men at the rate of 10¢ a round trip. In the event that your fares do not reach the sum of $60.00 upon any given day, we shall reimburse you for the difference. Where your fares exceed $60.00 a day, you will pay the excess to us up to a point where we are reimbursed for any monies paid to you by us under this license." "We understand that your boat is warranted to be in first class condition, with all necessary permits to operate in this service."

September 9, 1932, while on her way to Rikers Island with Heaney on board, a violent explosion wrecked the "Observation". He and many others were seriously injured.

Counsel for petitioners challenged the Board's jurisdiction upon the ground that as the accident occurred on navigable waters the rights and obligations of the parties were fixed by the maritime law. They also maintained that Heaney was not employed when injured.

The Board found: "Heaney stepped into his employment the moment he stepped aboard the said steamboat." "Such transportation by means of the steamship 'Observation' was included within and was part of the contract of employment between P. J. Carlin Construction Co., the employer herein, and Edward Heaney, the claimant, and was an incident of the claimant's employment. At the time Edward Heaney sustained the accidental injuries . . . the status of the claimant and the employer herein was a matter of local concern, was subject to the regulation of the State and in no way worked prejudice to any characteristic feature of the General Maritime Law. The claim . . . is within the jurisdiction of the Industrial Board and not such a matter as is subject to the exclusive jurisdiction of the Admiralty Law. This claim comes within the provisions of the Workmen's Compensation Law."

Without contesting the Board's finding in respect of employment, petitioners maintain here that the rights and obligations of the parties must be determined under the maritime law and the State Compensation Act has no application. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, *Spencer Kellogg and Sons, Inc.* v. *Hicks*, 285 U. S. 502, and kindred cases which hold that the rules of maritime law control rights and liabilities arising out of torts upon navigable waters are relied upon.

But as the Court of Appeals has pointed out: "No recovery is sought against the employer in this case because of any wrong alleged to have been done by the employer. A recovery is sought as the result of injuries for which the statute, read into the contract, gives a right to recovery." "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract . . ." See *Matter of Post* v. *Burger &*

Gohlke, 216 N. Y. 544; *Matter of Doey* v. *Howland Co.*, 224 N. Y. 30; also *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263, 271.

This Court has often ruled that the maritime law cannot be modified by state enactments so as materially to interfere with its essential uniformity. *State Industrial Commission* v. *Nordenholt Corporation, supra.* But this doctrine, we think, has no application in the circumstances here presented. The present attempt is to enforce a liability assumed by employer and insurance carrier under a non-maritime contract. All parties, as well as the accident, were within the limits of New York State. The contract had no direct relation to navigation; to enforce it against the parties before us will not materially interfere with the uniformity of any maritime rule. There is no claim against the ship or her owner; their rights are not in issue.

Spencer Kellogg and Sons, Inc. v. *Hicks, supra,* does not support petitioners' position. There the vessel's owner was held liable for injuries received on navigable waters in consequence of the master's negligence. The respondent here seeks to enforce a contract of employment which had no direct and immediate relation to navigation, business or commerce of the sea. *North Pacific Steamship Co.* v. *Hall Bros. Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 125; Benedict on Admiralty (5th Ed.) § 63.

The court below reached the correct conclusion, and its judgment must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.